Supreme Court, U.S.
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No. 03-__

IN THE

Supreme Court of the United States

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder—which impose assessments on beef producers and importers to fund research, education, and promotional activities carried out by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives under the direct supervision and control of the Secretary of Agriculture—are "unconstitutional and unenforceable."

2. Whether, even assuming that the Eighth Circuit correctly held unconstitutional the use of assessments to fund generic advertising under the Beef Act, the court erred in upholding a nationwide injunction that prohibits the collection of any assessments under the Act, even to fund research and education activities respondents did not challenge.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Nebraska Cattlemen, Inc. ("NCI"), Gary Sharp, and Ralph Jones. NCI is a nonprofit association representing Nebraska breeders, ranchers, and feeders, as well as county and local cattlemen's associations. NCI has no parent corporations and has issued no stock.

This case arises out of two appeals consolidated in the Eighth Circuit below: *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2769), and *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2832). Petitioners were appellants in No. 02-2832; the United States Department of Agriculture, Ann Veneman (in her official capacity as the Secretary of Agriculture), and the Cattlemen's Beef Promotion and Research Board were appellants in No. 02-2769. Appellees in both cases (and respondents here) were Livestock Marketing Association, Western Organization of Resource Councils, Robert Thullner, Johnny Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nebraska Cattlemen, Inc. ("NCI"), Gary Sharp, and Ralph Jones respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 335 F.3d 711 and reproduced at 1a in the appendix ("App.") to the petition for certiorari filed by the Solicitor General seeking review of the same judgment on behalf of the Federal defendants in this case. The opinion of the District Court is reported at 207 F. Supp. 2d 992 and reproduced at App. 31a.

JURISDICTION

The judgment of the Eighth Circuit was entered on July 8, 2003. App. 1a. On October 16, 2003, over the dissents of two judges, the Eighth Circuit denied a timely petition for rehearing en banc. App. 62a. On January 5, 2004, Justice Thomas extended the time for filing a petition for certiorari to and including February 13, 2004. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * * . [U.S. Const. amend. I.]

The relevant provisions of the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901 *et seq.*, and the regulations promulgated thereunder are reproduced at App. 63a-119a.

INTRODUCTION

The Eighth Circuit in this case declared "unconstitutional and unenforceable" an Act of Congress—the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq*. App. 28a. The Beef Act requires cattle producers and importers to pay a one dollar assessment (or "checkoff") on each head of cattle sold in the United States to fund research, education, and promotional activities—including generic advertising—intended to "strengthen the beef industry's position in the marketplace" and boost "the general economy of the Nation." 7 U.S.C. §§ 2901(a)(4), (b). To achieve these important governmental objectives, Congress created two special administrative bodies—the Cattlemen's Beef Promotion and Research Board ("Beef Board") and the Beef Promotion Operating Committee ("Operating Committee")—

to carry out a "coordinated program of promotion and research" under the direct supervision and control of the Secretary of Agriculture. *Id.* § 2901(b).

For more than 15 years, the Beef Board and Operating Committee have developed and implemented research, education, and promotional projects in accordance with their express statutory mandate. Promotional activities conducted by the Board and Committee include generic advertising, such as the well-known "Beef. It's What's For Dinner" ad campaign. Research and education projects have dealt with such topics as food-borne pathogens (including *E. coli*, salmonella, and listeria), the proper handling of beef products, nutrition and health, and cattle diseases, including so-called "mad cow" disease or bovine spongiform encephalopathy ("BSE"). The Board and the Committee's activities have benefited individual producers, the beef industry as a whole, and the public and the Nation's economy in general. Recent events involving the discovery of a BSE-infected cow in the United States both underscore and heighten the national importance of the research, education, and promotional activities conducted under the Beef Act.

The Eighth Circuit declared the Beef Act unconstitutional in its entirety on the ground that the First Amendment to the Constitution precludes the imposition of mandatory assessments on cattle producers and importers to fund generic advertising. On two previous occasions, this Court has granted review of decisions declaring unconstitutional assessments under similar regulatory programs. In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 477 (1997), this Court held that mandatory assessments to fund generic advertising under a marketing program for California tree fruit survived First Amendment scrutiny as "a species of economic regulation." Conversely, in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), the Court (over the dissents of Justices O'Connor, Ginsburg, and Breyer) held that mandatory assessments to fund generic advertising under

the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act"), 7 U.S.C. § 6101 *et seq.*, failed to pass muster under the First Amendment.

Significantly, the *United Foods* Court specifically declined to consider the argument that the generic advertising at issue was "government speech" because the argument had not been raised below. *See* 533 U.S. at 416-417. The government speech doctrine is based on the principle that "when [the government] is the speaker or when it enlists private entities to convey its own message * * * it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The generic advertising conducted under the Beef Act—prescribed in the first instance by Congress and formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives—is government speech. Under the government speech doctrine, the generic advertising does not violate the First Amendment because it does not even implicate the First Amendment.

Both petitioners and the Federal defendants in this case defended the constitutionality of the Beef Act on the ground that the generic advertising conducted thereunder is government speech. The Eighth Circuit held, however, that the government speech doctrine does not immunize the compelled funding of generic advertising under the Beef Act from First Amendment challenge. In its view, "government speech cases and compelled speech cases * * * are fundamentally different," and never the twain shall meet. App. 17a. According to the Eighth Circuit, the government speech doctrine applies *only* in cases challenging the government's "choice of content," not in cases challenging the government's compelled funding of speech. *Id.*

The Eighth Circuit's conclusion is not only fundamentally flawed, but contrary to this Court's precedents on the government speech doctrine. As the Court has made clear, a fundamental principle of the government speech doctrine is that the government may compel funding of its *own* speech without implicating the First Amendment. *See, e.g., Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000) (the government may spend "funds raised * * * for speech and other expression to advocate and defend its own policies"). Thus, the Court has specifically applied the government speech doctrine in a case involving the compelled funding of speech. *See Keller* v. *State Bar of Cal.*, 496 U.S. 1, 10-13 (1990).

The Eighth Circuit's decision is also contrary to this Court's precedents on the proper scope of injunctive relief. Although this Court has held that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), the Eighth Circuit upheld a nationwide injunction against the further collection of *any* assessments under the Beef Act, even to fund research and education activities the District Court below acknowledged were "unobjectionable." App. 57a. Thus, even assuming the Eighth Circuit correctly concluded that the generic advertising under the Beef Act is unconstitutional, the court had no basis whatsoever to bar the collection of funds for the other important regulatory objectives of the Act.

The conflicts between the Eighth Circuit's decision and this Court's precedents is reason alone to grant certiorari. *See* S. Ct. R. 10(c). The Eighth Circuit's decision, however, also conflicts with that of another federal circuit, presenting another compelling basis for certiorari. *See* S. Ct. R. 10(a). In *United States* v. *Frame*, 885 F.2d 1119, 1133-37 (3d Cir. 1989),), *cert denied*, 493 U.S. 1094 (1990), the Third Circuit held that the Beef Act survives scrutiny under the commercial speech test articulated by this Court in *Central Hudson*

Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557 (1980). Subsequently, in *Wileman*, this Court questioned whether the *Central Hudson* test even applies in cases "involving the compelled funding of speech." 521 U.S. at 474 n.18. In *United Foods*, however, the Court declined to consider whether the generic advertising in question survived scrutiny under *Central Hudson* because the issue had not been raised in that case. *See* 533 U.S. at 410. When presented below with the argument that the generic advertising under the Beef Act is valid under *Central Hudson*, the Eighth Circuit held—in direct conflict with the Third Circuit in *Frame*—that the Beef Act fails to survive scrutiny under *Central Hudson*. *See* App. 22a-28a. It did so, moreover, by applying a strange amalgam of *Central Hudson* and other precedents that lacks any foundation in this Court's First Amendment jurisprudence.

Wholly apart from the foregoing conflicts, certiorari is warranted by the undeniable national importance of the question presented. The Eighth Circuit has declared "unconstitutional and unenforceable" an important government program, App. 28a, while at the same time cast doubt on the constitutionality of scores of similar regulatory programs. In the wake of *United Foods*, numerous First Amendment challenges have been mounted against such programs, and considerable uncertainty and confusion exists in the lower courts over the issues left open by that decision. The Court should grant certiorari to eliminate that uncertainty and confusion, resolve the conflicts created by the Eighth Circuit below, and determine whether "the exercise of the grave power of annulling an Act of Congress" was justified here. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

STATEMENT OF THE CASE

Statutory and Regulatory Background. Recognizing that "the production of beef and beef products plays a significant role in the Nation's economy," and that "the mainte-

nance and expansion of existing markets for beef and beef products are vital to * * * the general economy of the Nation," Congress enacted the Beef Act to "strengthen the beef industry's position in the marketplace" through a "coordinated program of promotion and research." 7 U.S.C. §§ 2901(a)(2), (4), (b). To accomplish these important governmental objectives, the Act provides for the establishment and selection of the Beef Board and the Operating Committee to administer the program. *Id.* §§ 2903(b), 2904(1), (4)(A).[1]

The Board and the Committee administer the program under the direct supervision and control of the Secretary of Agriculture. The Secretary appoints all the members of the Board, *see* 7 U.S.C. § 2904(1), half the Committee's members, *see id.* § 2904(4)(A), and has the power to remove all members of both, *see* 7 C.F.R. § 1260.213. *All* plans and projects developed under the Act must be submitted to the Secretary for approval. 7 C.F.R. §§ 1260.168(e), 1260.169. The Secretary must also approve annual budgets submitted by the Board and the Committee. 7 U.S.C. §§ 2904(2)(D), (4)(C); 7 C.F.R. § 1260.150(g). The Committee must also obtain the Secretary's approval to enter into contracts for implementing and carrying out the promotional and research activities authorized by the Act. 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(b),(f).

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[1] The Act directs the Secretary of Agriculture to promulgate a "beef promotion and research order" ("Beef Order"). 7 U.S.C. § 2903(b). The Beef Order and related regulations were issued by the Secretary in 1986. *See* 7 C.F.R. Part 1260. Within 22 months after the Beef Order was issued, the Secretary was required to conduct a referendum among producers and importers, and to continue the Order only if approved by a majority of producers voting in the referendum. 7 U.S.C. § 2906(a). On May 10, 1988, the referendum was conducted and approved by nearly 80% of voting producers. *See* 8th Cir. J.A. 580.

The books and records of the Board and Committee are subject to inspection and audit by the Secretary, and the Board and the Committee must prepare such reports as the Secretary may prescribe. 7 U.S.C. § 2904(7). The Board and the Committee must also submit to the Secretary information as requested, and must give the Secretary notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. §§ 1260.150(m), (o), 1260.168(h), (i). In short, as the uncontroverted evidence in this case established, the Secretary exercises extensive oversight and control over all aspects of the checkoff program.

The research, education, and promotional activities authorized by the Act are funded by assessments—or "checkoffs"—paid by producers and importers in the amount of one dollar per head of cattle sold in the United States. 7 U.S.C. §§ 2904(4)(B), (8). The Act expressly prohibits the use of assessments collected by the Board for "influencing governmental action or policy, with the exception of recommending amendments to the order." *Id.* § 2904(10). With the Secretary's approval, the Board may invest such funds, pending disbursement, in certain obligations and interest-bearing accounts. *Id.* § 2904(9). Any patents, copyrights, inventions, or publications developed through the use of checkoffs are "the property of the U.S. Government." 7 C.F.R. § 1260.215(a).

District Court Proceedings. The individual respondents are cattle producers who do not wish to pay the assessments required by the Beef Act. In December 2000, they (and two advocacy organizations) brought this action against the United States Department of Agriculture ("USDA"), the Secretary of Agriculture, and the Beef Board, challenging the Secretary's implementation of the checkoff program on various grounds. Petitioners—two South Dakota cattle producers and a nonprofit association representing Nebraska cattle producers and local cattlemen's associations—intervened to defend the checkoff program. On June 25,

2001, while this case was pending, this Court issued its decision in *United Foods* holding that the imposition of assessments to fund generic advertising under the Mushroom Act violated the First Amendment.

Respondents thereafter amended their complaint to allege that the generic advertising conducted under the Beef Act also violates the First Amendment. On cross-motions for summary judgment, petitioners and the Federal defendants argued that the generic advertising under the Beef Act is government speech, and thus free from First Amendment scrutiny. In addition, petitioners and the Federal defendants argued that, even if the advertising is not considered government speech, it is nonetheless constitutional under *Central Hudson* as a valid regulation of commercial speech, and under *Wileman* as "a species of economic regulation," *Wileman*, 521 U.S. at 477, that simply "[does] not raise First Amendment concerns." *United Foods*, 533 U.S. at 415. The District Court denied the parties' summary judgment motions, and scheduled a trial on respondents' First Amendment claims.

The District Court's Decision. Following a two-day trial at which petitioners and the Federal defendants presented substantial, unrebutted evidence concerning the Secretary's extensive oversight and control of the checkoff program, the District Court issued a decision striking down the Beef Act in its entirety. App. 31a. The court recognized that in *Wileman*, this Court had upheld "a similar generic advertising program" for California tree fruit. App. 40a. Nevertheless, the court concluded that the outcome in this case was dictated by *United Foods*, not *Wileman*. The court noted that the *United Foods* Court had distinguished *Wileman* on the ground that the assessments in that case were ancillary to a broader regulatory scheme, whereas the assessments in *United Foods* were not. App. 44a. Without examining any of the numerous statutes regulating the beef industry, the court concluded that "[b]eef producers and sellers are not in

any way regulated to the extent that the California tree fruit industry is regulated," and that the assessments under the Beef Act therefore were "not germane to a larger regulatory purpose." App. 47a-48a. Accordingly, the court held, "[t]he beef checkoff is unconstitutional in violation of the First Amendment." App. 48a.

In the course of reaching its decision, the court declined to apply the *Central Hudson* test for commercial speech to the generic advertising at issue, concluding that this Court had "rejected" the use of that test in *Wileman* "because [*Central Hudson*] involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders." App. 40a. The court also rejected the argument that the generic advertising conducted under the Beef Act is government speech and therefore not constrained by the First Amendment. After initially expressing doubt as to the existence of the government speech doctrine, *see* App. 49a-51a—despite numerous pronouncements by this Court on the matter—the District Court went on to conclude that the Beef Board was "more akin" to a private entity than a government agency, and thus not engaged in government speech. App. 51a.

The court acknowledged that "the Board * * * [was] created by statute to further the policy of the United States Congress to promote beef for the purpose of strengthening the beef industry's position in the marketplace," and that "the Secretary must approve the appointment of those nominated." App. 54a. Without citation to the record, the court concluded, "based upon the evidence," that "such approval is merely *pro forma*." App. 55a. The court also acknowledged that "all projects are submitted to the Secretary for final approval to spend checkoff funds," and that "USDA employees attend every meeting of the Board, the Operating Committee, and the [Board's] Executive Committee." *Id.* Again without citation to the record, the court stated that a USDA official had "admitted that USDA oversight is more akin to

ministerial review of the Board's compliance with the Order." *Id.* The court also found it significant that the Board's activities were funded by special assessments, rather than general tax revenues, and that the Board's advertisements bear the Board's copyright, and not "the distinctive notice from the Government Printing Office." App. 54a, 56a.

The court then issued an order striking down the entire Beef Act and enjoining the further collection of *any* assessments under the Act. Even though assessments collected under the Act are also used to fund research and education projects—activities the District Court itself acknowledged were "unobjectionable"—the court refused to limit its injunction to the collection of assessments to fund promotion, stating that "it would be impossible to separate what portion of any individual's checkoff assessment is related to the objectionable generic beef promotion activities." App. 57a. The court also refused to limit relief to the five individual respondents found to have standing in this case, reasoning that to do so "would only encourage numerous other producers, importers, and other sellers of beef on the hoof to file additional lawsuits in this and other federal jurisdictions." App. 58a.[2]

The Eighth Circuit's Decision. The Eighth Circuit affirmed. The court began its analysis by recognizing that "[t]he government speech doctrine has firm roots in our system of jurisprudence." App. 15a. Under its view of the doctrine, however, "when the government speaks, it is [not] entirely immune from all types of First Amendment free speech claims." App. 16a. Rather, the court opined, "when the government speaks in its role as the government, it may

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[2] The Eighth Circuit subsequently issued a stay of the District Court's order and judgment pending appeal. Following the denial of rehearing en banc, the Eighth Circuit issued a stay of its mandate pending the filing of a petition for certiorari and the final disposition of the case by this Court.

be immune from First Amendment challenge *based upon its choice of content*." App. 16a-17a (emphasis added). In this case, the court observed, respondents "are challenging the government's authority to compel them to support speech with which they personally disagree," and not "the content of government speech." App. 17a. "The two categories of First Amendment cases—government speech cases and compelled speech cases—are fundamentally different." *Id.*

Because respondents asserted a First Amendment right "to protect themselves from being compelled to pay for * * * speech[] with which they disagree," the court concluded that their claim was governed by this Court's "compelled speech line of cases," including *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), and *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). App. 18a-19a. Yet no sooner had the court identified that line of cases as controlling, when the court stated that "we must decide what constitutional standard applies when compelled subsidies are used to fund generic commercial advertising." App. 19a.

The court noted that the District Court had declined to apply the *Central Hudson* test because this Court had declined to apply it in *Wileman*. App. 20a. The Eighth Circuit, however, "disagree[d]" with the District Court's reasoning "because it fails to account for the more recent pronouncements in *United Foods*." App. 21a. There, the Eighth Circuit observed, this Court "went out of its way" to distinguish the California tree fruit industry from the "more commercially competitive" mushroom industry. *Id.* The Eighth Circuit thus "infer[red] that, had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case." *Id.* The Eighth Circuit recognized that *Central Hudson* "involved a restriction on speech, while the present case involves compelled speech." App. 21a-22a (footnote omitted). In its view, however, "it is more significant that *Central Hudson* and the case at bar both

involve government interference with private speech in a commercial context." App. 22a. Accordingly, the Eighth Circuit "now adapt[ed] the *Central Hudson* test to [respondents'] First Amendment claim." *Id.*

Addressing the first prong of the *Central Hudson* test—whether the government's interest in the speech at issue is "substantial"—the court declared, "[a]t this juncture, we may now revisit appellants' government speech arguments." App. 23a. "[C]onsistent with the district court's conclusion that the advertising in question is not government speech," the court concluded, "we consider the substantiality of the government's interest to be highly doubtful." App. 24a. Nevertheless, the court held, "even assuming that the government's interest is substantial," it must be "sufficiently substantial to justify the infringement upon [respondents'] First Amendment rights." *Id.*

Thus, the court held, "[a]t this point, the analysis turns largely upon the nature of the speech in question." *Id.* The court then turned back to *Keller* and *Abood*, noting that in those cases this Court "considered the nature of the speech at issue in terms of whether or not it was *germane* to the institutional purposes which justified the mandatory dues in the first place." *Id.* (emphasis in original). The court also noted that, more recently, in *Board of Regents of the University of Wisconsin System* v. *Southworth*, *supra*, this Court "determined that the germaneness standard was 'unmanageable' in the context of a state university," and held instead that " '[t]he proper measure, and the principal standard of protection for objecting students * * * is the requirement of viewpoint neutrality in the allocation of funding support.' " App. 25a (alterations in original) (quoting *Southworth*, 529 U.S. at 233).

The Eighth Circuit observed that this Court "has repeatedly warned that, when assessing the nature of speech in the compelled speech context—whether based upon germane-

ness, viewpoint neutrality, or some other benchmark—the analysis often comes down to a difficult line-drawing exercise." App. 26a. The court concluded, however, that "we need not, ourselves, engage in such a line-drawing exercise," for "[t]he Supreme Court has already drawn the relevant line for us" in *United Foods*. *Id.* Stating that it was "duty-bound to reconcile and apply the precedents of the Supreme Court to the best of our ability," the court concluded that "[t]he beef checkoff program is, in all material respects, identical to the mushroom checkoff program." App. 28a. Thus, the court held, "the government's interest in protecting the welfare of the beef industry * * * is not sufficiently substantial to justify the infringement on [respondents'] First Amendment free speech right." *Id.* Accordingly, the court held, the Beef Act is "unconstitutional and unenforceable." *Id.* The court then went on to uphold the District Court's nationwide injunction enjoining the further collection of *any* assessments under the Beef Act, holding that Congress's omission of a severability clause in the 1985 amendment of the Act constituted a "clear expression" of non-severability such that "no remaining aspects of the Act can survive." App. 29a.

Both petitioners and the Federal defendants filed timely petitions for rehearing en banc. Although Judges Murphy and Melloy voted to grant rehearing, the petitions were denied. App. 62a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IS CONTRARY TO DECISIONS OF THIS COURT.

A. The Eighth Circuit's Decision Is Contrary To This Court's Precedents On The Government Speech Doctrine.

The Eighth Circuit began its analysis in this case by correctly recognizing that "[t]he government speech doctrine has firm roots in our system of jurisprudence." App. 15a. But

the court quickly veered off course, holding that "when the government speaks, it is [not] entirely immune from all types of First Amendment free speech claims." App. 16a. In the Eighth Circuit's view, the government speech doctrine applies *only* in cases involving challenges to the government's "choice of content," and not in cases involving the compelled funding of speech. App. 17a. The latter category of cases, the court determined, involve "a form of government interference with private speech." *Id.* (quotation omitted). Thus, government speech cases and compelled funding of speech cases, the court held, "are fundamentally different." *Id.* Because respondents have "challeng[ed] the government's authority to compel them to support speech with which they personally disagree," the court concluded that the government speech doctrine does not apply in this case. *Id.*

The Eighth Circuit's conclusion is contrary to this Court's precedents on the government speech doctrine. As the Court has made clear, "when [the government] is the speaker * * * *it is entitled to say what it wishes*." *Rosenberger*, 515 U.S. at 833-834 (emphasis added); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"). Thus, contrary to the Eighth Circuit's conclusion, "when the government speaks," it is in fact "*entirely* immune from all types of First Amendment free speech claims." App. 16a (emphasis added). The First Amendment limits the government's interference with *private* speech; it does not limit the government's *own* speech.

The Eighth Circuit's decision creates a false dichotomy between cases involving the compelled funding of speech and those involving government speech. The government speech doctrine is premised on the principle that the government may compel funding of its "speech and other expression to advocate and defend its own policies," *Southworth*,

529 U.S. at 229, for the government's speech is necessarily paid for by citizens who may or may not agree with the government's message. *See id.* at 229 (the government may spend "*funds raised* * * * for speech and other expression to advocate and defend its own policies") (emphasis added); *Rosenberger*, 515 U.S. at 833 ("when the government appropriates *public funds* to promote a particular policy of its own it is entitled to say what it wishes") (emphasis added). The government's use of "funds raised" for its *own* speech is not in any sense "a form of government interference with private speech"; in using such funds to add its *own* voice to the marketplace of ideas, the government neither prohibits nor compels speech by *others*.[3]

If the Eighth Circuit were correct, *every* citizen—including smokers who object to the government's anti-smoking ads, pacifists who object to the government's promotion of the armed services, and isolationists who object to the government's foreign policy—would have the right to insist that his or her tax dollars not be used to support programs or policies with which he or she disagreed.[4] As this Court explained in *Keller*, *supra*, however, that is decidedly not the case:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. * * * If every citizen were to have a right to insist that no one paid by public funds ex-

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[3] The government's use of "funds raised" to engage in its own speech is by no means unchecked. As in the case of any other government program, the public—through the democratic process—may call for the end of the program, or insist on a different message.

[4] Moreover, if the Eighth Circuit were correct, a citizen could influence the government's "choice of content"—an area the Eighth Circuit believed was "immune from First Amendment challenge"—simply by challenging the government's right to compel funding of its message. App. 16a-17a.

> press a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. [496 U.S. at 12-13.]

Cf. United States v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Indeed, in *Keller*, the Court specifically applied the government speech doctrine in the compelled funding context. In that case, members of the State Bar of California challenged the Bar's use of their dues to finance certain ideological and political activities to which they objected.[5] The Bar contended that it was a government entity and that its expressive activities were thus immune from First Amendment inquiry. Because the Court concluded that the Bar was not like a typical government agency, which "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents," the Court held that the Bar's expressive activities were not government speech. 496 U.S. at 12-13. Yet if the Eighth Circuit were correct that the government speech doctrine does not apply in the compelled funding context, the Court would never have engaged in such an inquiry. The Eighth Circuit's decision, therefore, cannot be reconciled with this Court's decision in *Keller*.

Nor can the Eighth Circuit's decision be squared with the Court's decision in *Southworth*, *supra*. The Eighth Circuit cited *Southworth* as support for its conclusion that govern-

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[5] The Bar was alleged to have been engaged in such openly political activities as "endors[ing] * * * gun control * * * [and] nuclear weapons freeze initiative[s]." 496 U.S. at 15. The Beef Act expressly prohibits spending for such political activities, *see* 7 U.S.C. § 2904(10), and limits permissible speech activities to commercial advertisements promoting beef.

ment speech and compelled funding of speech cases are "fundamentally different." App. 17a-18a. Like *Keller*, however, *Southworth* also demonstrates that the government speech doctrine applies in the compelled funding context. In *Southworth*, a group of students brought a First Amendment challenge to a mandatory student activity fee imposed by a public university and used to support organizations engaging in political and ideological speech to which they objected.

At the outset, the Court observed that "[t]he government, as a general rule, may support valid programs and policies *by taxes or other exactions* binding on protesting parties." 529 U.S. at 229 (emphasis added). Thus, the Court held, "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might well be evaluated on the premise that the government itself is the speaker." *Id.* But "[t]he University having *disclaimed* [the] speech [as] its own," the case did not "raise the issue of the government's right * * * to use its own funds to advance a particular message." *Id.* (emphasis added). At the conclusion of its decision, the Court emphasized that it "ha[d] not held, or suggested, that when the government speaks the rules we have discussed come into play." *Id.* at 235. Rather, the court stated, if the case had involved the university's *own* speech, "the analysis likely would be altogether different." *Id.* (citing *Rust* v. *Sullivan*, 500 U.S. 173 (1991)).[6]

The Eighth Circuit interpreted this last statement to mean that government speech and compelled funding of speech cases are mutually exclusive. *See* App. 17a-18a. The court failed to recognize, however, that if the university had argued that the speech at issue was its *own*, the case would *still* have involved the compelled funding of speech. That is, the

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[6] The Court has interpreted *Rust* as holding that the government may "use[] private speakers to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833.

students' challenge would still have been to the compelled funding of speech to which they objected. Had the university argued that it was "us[ing] its own funds to advance a particular message," the analysis would have been "different" in that the Court would have considered whether the speech could be sustained "under the principle that the government can speak for itself"—in other words, as government speech. 529 U.S. at 229.

The Eighth Circuit's misunderstanding of the government speech doctrine appears to stem from its confusion of compelled funding of government speech with the government's compulsion of speech *by others*. This case, which involves the compelled funding of a government program by those who, in Congress's judgment, "most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2), is a far cry from those in which the government attempts to compel adherence to its own message, as was the case in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to recite the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable. For the government to compel political or ideological speech from the lips of a reluctant entity is worlds apart from compelling that entity to contribute financially to support government-supervised commercial speech, especially when that speech directly benefits the entity's own interests.

The Eighth Circuit's confusion is evident from its citation of *Wooley* to support its conclusion that the government speech doctrine does not apply in this case. *See* App. 23a n.9. In contrast to *Wooley*, no one here is being forced to carry the government's message. That is, no one is being asked to express his or her own belief that beef is "a valuable part of human diet." 7 U.S.C. § 2901(a)(1). The Eighth Circuit's reliance on *Wooley* is contrary to the Court's

decision in *Wileman*, where the Court found *Barnette* and *Wooley* and *all* the Court's "compelled speech case law * * * *clearly inapplicable*" to cases, like this, involving the compelled funding of a generic advertising program. *Wileman*, 521 U.S. at 470-471 (emphasis added).

B. The Eighth Circuit's Decision Is Contrary To This Court's Precedents On The Proper Scope Of Injunctive Relief.

This Court has held that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). The Eighth Circuit's decision striking down the Beef Act in its entirety is contrary to that established principle in two respects. *First*, the Eighth Circuit enjoined the collection of *any* assessments under the Beef Act, even to fund research and education activities which respondents did not challenge. *Second*, the Eighth Circuit upheld a nationwide injunction prohibiting the collection of assessments from *anyone*, not just the five individual respondents found to have standing here. *See* App. 37a. This is not a class action, and respondents have alleged only that the Beef Act violates *their* First Amendment rights. *See* 8th Cir. J.A. 41. Thus, even assuming that the Eighth Circuit correctly held that the imposition of assessments to fund generic advertising is unconstitutional, the court's decision goes far beyond what is necessary "to provide complete relief to the plaintiffs." *Yamasaki*, 442 U.S. at 702.

The Eighth Circuit's decision further contravenes this Court's admonition that "[a] court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (quotations and alterations omitted). As this Court has instructed, "[w]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the

act in so far as it is valid." *Id.* "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* (quotations omitted).

The Beef Act itself confirms that Congress would have intended the Act's research and education provisions to remain in force in the event its promotion provisions were invalidated.[7] The Act, after all, is entitled the "Beef Promotion *and* Research Act." Its purpose is to further important governmental objectives through "promotion *and* research." 7 U.S.C. § 2901(b) (emphasis added). The Act provides for the development of plans or projects of not only promotion and advertising, but "research, consumer information, and industry information." *Id.* § 2904(4)(B). Those latter initiatives are vitally important. As the record in this case reflects, checkoff dollars have long been used to fund research on and disseminate information about BSE and other food safety issues. *See* Tr. 198, 247-248, 299-301. Since the recent discovery of a BSE-infected cow in the United States,

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[7] The Beef Act does not contain a severability clause. As this Court has held, however, "[i]n the absence of a severability clause * * * Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686. The Eighth Circuit nevertheless concluded that Congress had "clear[ly] express[ed]" its intent that the entire Beef Act be stricken if a single provision were declared unconstitutional by "specifically delet[ing]" a pre-existing severability provision when it completely overhauled the Act in 1985. App. 29a. The court, however, failed to identify anything in the legislative history suggesting that the omission was deliberate. The annotation following 7 U.S.C.A. § 2901—which is all the court cited—states only that the provision " 'was omitted.' " App. 29a (quoting note following 7 U.S.C.A. § 2901).

checkoff dollars have played a significant role in educating the public about BSE. *See, e.g.*, BSEinfo.org, *at* http://www.bseinfo.org.

Finally, in upholding a nationwide injunction, the Eighth Circuit improperly allowed cattle producers who support the promotion conducted under the Beef Act to be "silenced by the dissenters." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 773 (1961). At the very least, the Eighth Circuit should have limited the injunction to the collection of assessments from objecting producers, and then only as to an amount reflecting the percentage of checkoff funds used for promotional activities. *See id.* at 774 (holding that "dissent is not to be presumed" and that "[a]ny remedies * * * would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object"); *Abood*, 431 U.S. at 240-242 (discussing possible remedies in similar circumstances, including "the reduction of future exactions by the same proportion" of funds spent on objectionable speech).

II. THE EIGHTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

The Eighth Circuit's decision also directly conflicts with the Third Circuit's decision in *Frame* on the application of the *Central Hudson* test to the very same Act of Congress. Whereas the Third Circuit held that the Beef Act passes constitutional muster under *Central Hudson*, the Eighth Circuit held that it does not. *See* 885 F.2d at 1133-37; App. 22a-28a. This clear circuit conflict provides an independent reason to grant certiorari. *See* S. Ct. R. 10(a).[8]

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[8] The Tenth Circuit has also upheld the Beef Act under this Court's decision in *Wileman*. *See Goetz v. Glickman*, 149 F.3d

Under *Central Hudson*, the government must demonstrate that regulation of commercial speech (1) furthers a substantial government interest; (2) directly advances that interest; and (3) is not more extensive than necessary to serve that interest. 447 U.S. at 566. The Third Circuit held that the Beef Act survives scrutiny under the *Central Hudson* test because it in fact survives scrutiny under an even *stricter* First Amendment standard. *See* 885 F.2d at 1134 n.12; *see also id.* at 1133-37 (holding that Beef Act survives strict scrutiny under the standard articulated in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984)). As the court concluded, "preventing the collapse of a vital sector of the national economy qualifies as a compelling state interest," and "requiring beef producers to contribute to the cost of commercial advertising intrudes upon speech * * * no more than necessary to achieve this goal." *Id.* at 1134 n.12.

Without even acknowledging the Third Circuit's decision in *Frame*, the Eighth Circuit concluded that the Beef Act did not survive scrutiny under *Central Hudson*. App. 22a-28a. Moreover, instead of applying *Central Hudson*'s straightforward criteria to the Beef Act—as the Third Circuit did in *Frame*—the court applied a bewildering amalgam of *Central Hudson* and other precedents that has no foundation in this Court's jurisprudence, or the First Amendment itself. *See supra* at 12-14; App. 22a-28a. This Court should grant certiorari to resolve this direct conflict between two federal

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1131, 1138-39 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). Although the Tenth Circuit's decision was issued before this Court's decision in *United Foods*, this case is in fact closer to *Wileman* than *United Foods* in that the promotion conducted under the Beef Act—like the promotion conducted under the marketing orders in *Wileman*—is part of a "broader regulatory scheme," and accordingly "[does] not raise First Amendment concerns." *United Foods*, 533 U.S. at 412, 415. The Court's decision in *Wileman* thus provides another basis for upholding the Beef Act.

circuits on the proper application of the *Central Hudson* test in this important context.

III. THE EIGHTH CIRCUIT'S DECISION INVOLVES A RECURRING ISSUE OF UNDENIABLE NATIONAL IMPORTANCE.

Wholly apart from the conflicts engendered by the Eighth Circuit's decision, this case presents an issue of undeniable national importance. The Eighth Circuit has declared "unconstitutional and unenforceable" an Act of Congress. App. 28a. That alone presents a sufficient basis for granting certiorari. *See United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) (granting certiorari because court of appeals "invalidated a portion of an Act of Congress"); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (granting certiorari "[b]ecause the Court of Appeals held an Act of Congress unconstitutional"); Robert L. Stern *et al.*, *Supreme Court Practice* 436 (8th ed. 2002) ("Decisions invalidating acts of Congress * * * are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict"). The significance of the question presented is underscored by the fact that this Court has *twice* granted review of decisions declaring unconstitutional assessments under similar regulatory programs, while expressly leaving open the government speech issue presented here. *See United Foods*, 533 U.S. at 408, 416-417; *Wileman*, 521 U.S. at 466-467 (granting certiorari to resolve conflict with *Frame*).

In striking down the Beef Act in its entirety, the Eighth Circuit invalidated an important government program that Congress expressly determined was "in the public interest." 7 U.S.C. § 2901(b). As the Third Circuit concluded in *Frame*, the Beef Act advances the "compelling state interest" of "preventing the collapse of a vital sector of the national economy." 885 F.3d at 1134 n.12. *See also id.* at 1134 (Beef Act passed to "prevent[] further decay of an already deterio-

rating beef industry"); Rod Smith, *Industry Officials See Domino Effect*, Feedstuffs, Aug. 13, 2001, at 1 (implementation of beef checkoff program "halted a 20-year beef demand erosion"). As recent events have demonstrated, the beef checkoff program is now as important as ever to the beef industry and the Nation's economy.[9]

Moreover, in declaring the entire Beef Act "unconstitutional and unenforceable," the Eighth Circuit cast doubt on the constitutionality of numerous similar federal and state programs that have been familiar features of the agricultural sector for years.[10] The Eighth Circuit's decision thus "encourage[s] wider non-compliance," and "engender[s] those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka*, 329 U.S. 287, 293 (1946) (upholding injunction requiring payments by handlers under agricultural marketing program).

Indeed, in the wake of *United Foods*, numerous First Amendment challenges have been brought against various

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[9] *See, e.g.*, Steve Raabe, *Groups Launch Ads to Counter Mad-Cow Publicity*, Denver Post, Jan. 20, 2004; *USDA Says Mad Cow Will Cut Cattle Prices*, L.A. Times, Jan. 13, 2004; *Mad Cow Could Keep Cattle Prices Lower for Months*, L.A. Times, Jan. 12, 2004; Paul Davidson, *Beef Processors Ease Production, Lay Off Workers*, USA Today, Jan. 2, 2004; Randy Fabi & Charles Abbott, *Worries Over Mad Cow Torpedo Cattle Prices*, The Star-Ledger, Dec. 31, 2003; Victoria Sizemore Long, *Mad Cow Case Darkens the Outlook for Cattle Futures*, Kansas City Star, Dec. 30, 2003; Suzanne McGee, *New Year Worry; Economy May Trip Over Mad Cow, Tepid Sales*, N.Y. Post, Dec. 29, 2003; Bill Barnhart, *Mad Cow Case to Affect Economy*, Chicago Tribune, Dec. 25, 2003.

[10] Similar federal agricultural commodity promotion and research programs are currently in place for, among other things, dairy products, 7 U.S.C. §§ 4501 *et seq.*, cotton, 7 U.S.C. §§ 2101 *et seq.*, eggs, 7 U.S.C. §§ 2701 *et seq.*, pork, 7 U.S.C. §§ 4801 *et seq.*, soybeans, 7 U.S.C. §§ 6301 *et seq.*, honey, 7 U.S.C. §§ 4601 *et seq.*, and popcorn, 7 U.S.C. §§ 7481 *et seq.*

agricultural commodity promotion and research programs. *See, e.g.*, *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157 (2003) (pork), *petition for cert. filed* (Jan. 20, 2004) (No. 03-1043); *Pelts & Skins, L.L.C.* v. *Jenkins*, 259 F. Supp. 2d 482 (2003) (alligator products); *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290 (2003) (apples); *Avocados Plus Inc.* v. *Veneman*, No. 02-1798 (D.D.C. Feb. 14, 2003), *vacated*, (D.D.C. Apr. 14, 2003) (avocados); *Charter* v. *USDA*, 230 F. Supp. 2d 1121 (2002) (beef).

Decisions in these cases reveal profound disarray and confusion among courts in this important area of constitutional law. For example, whereas the District Court below held that the generic advertising conducted under the Beef Act is *not* government speech, concluding that the evidence in this case demonstrates that USDA's oversight is merely "ministerial," App. 55a, the district court in *Charter* held—*on essentially the same record*[11]—that the advertising under the Beef Act *is* government speech, concluding that "[b]y no means is the government's control over the checkoff-funded program *pro forma*." 230 F. Supp. 2d at 1138. The Eighth Circuit below, of course, never reached the issue, holding instead, as a categorical matter, that the government speech doctrine does not even apply in this case because it involves the compelled funding of speech. *See supra* at 11-12; App. 15a-19a.

The Sixth Circuit, in *Michigan Pork Producers*, did not follow the Eighth Circuit's approach, but instead considered whether the generic advertising at issue was government speech. 348 F.3d at 161-162. In further contrast to the Eighth Circuit—which concluded that, "had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the

---

[11] The parties in *Charter* stipulated to the submission of the case for decision on the summary judgment record in that case and the trial transcript in this case. *See* 230 F. Supp. 2d at 1123.

circumstances of that case," App. 21a—the Sixth Circuit, relying on *Wileman*, found *Central Hudson* "inapplicable" to cases involving the compelled funding of speech. 348 F.3d at 163. The *Charter* court also concluded that *Central Hudson* "does not apply" in this context. 230 F. Supp. 2d at 1141. The court held, however, that, "assuming the commercial speech test does control this case, the checkoff-funded program passes constitutional muster." *Id.* In so holding, the court applied the straightforward criteria of *Central Hudson*, not the bizarre concoction of *Central Hudson* and other precedents applied by the Eighth Circuit below. *See supra* at 12-14; App. 22a-28a.

This Court's guidance on the application of the First Amendment in this important regulatory context is clearly needed. Such litigation and confusion will continue to proliferate until this Court more definitively resolves the constitutionality of these programs. This case provides a timely and ideal vehicle for the Court to resolve the government speech and other issues left open by *United Foods*. *See e.g.*, *Michigan Pork Producers*, 348 F.3d at 161 ("the Court has yet to consider whether programs similar in nature to the Pork Checkoff Program constitute governmental speech"); *Charter*, 230 F. Supp. 2d at 1130 ("It is obvious that both *Wileman Brothers* and *United Foods* were decided without considering whether the agricultural marketing programs amounted to government speech."). The Court should thus grant certiorari to decide whether the Eighth Circuit properly held that no valid constitutional basis exists to uphold an Act of Congress deemed "vital" to "the general economy of the Nation." 7 U.S.C. § 2901(a)(4).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

* Counsel of Record

Counsel for Petitioners

(4) (2)

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In The
Supreme Court of the United States

ANN VENEMAN, Secretary,
United States Department of Agriculture, *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

RONALD A. PARSONS, JR.
SCOTT N. HEIDEPRIEM
JOHNSON, HEIDEPRIEM, MINER, MARLOW & JANKLOW, LLP
431 N. Phillips Avenue
Suite 400
Sioux Falls, SD 57104
(605) 338-4304

PHILIP C. OLSSON
Counsel of Record
RYAN W. STROSCHEIN
OLSSON, FRANK AND WEEDA, P.C.
1400 Sixteenth Street, N.W., Suite 400
Washington, D.C. 20036-2220
(202) 518-6366

BEST AVAILABLE COPY

RULE 29.6 STATEMENT

Livestock Marketing Association (LMA) and Western Organization of Resource Councils (WORC) are non-profit associations. Neither LMA or WORC have any parent corporations or have issued any stock.

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RESPONDENTS' BRIEF IN OPPOSITION

Three terms ago, in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court held that mandatory assessments pursuant to a generic commodity promotion program violated the First Amendment by compelling objecting producers to support speech with which they disagreed. Petitioners now assert that mandatory assessments pursuant to a virtually identical program do not violate the First Amendment because they are "government speech." Since this issue had only been raised before this Court and not in the court of appeals, this Court declined to address government speech in *United Foods*. Distilled to its essence, the question now raised is: are producers' First Amendment rights to be free from compelled speech, as identified and affirmed in *United Foods*, neutered and lost when an otherwise unconstitutional commodity promotion program is recharacterized as government speech?

The Eighth Circuit in this case considered and rejected petitioners' government speech argument, invalidating a commodity promotion program that is substantively identical to the one held unconstitutional in *United Foods*. This result was unsurprising. This Court has never applied the concept of government speech immunity as a justification for violating First Amendment rights. No circuit court has *ever* adopted petitioners' contention that compulsory commodity promotion is government speech that should be immune from the First Amendment. All three circuits that have since considered the issue have joined the Eighth Circuit in rejecting it. There accordingly is no compelling legal issue at stake, no split among the circuits to resolve, and no exigent reason to wade into the uncharted waters of government speech.

Although the Eighth Circuit's decision invalidated an Act of Congress, that result was pre-ordained by *United Foods*. Petitioner has refused to accept or implement this Court's decision in that case, and now asks this Court to grant certiorari for the second time in three years on the constitutionality of substantively identical commodity promotion programs. Lacking the benefit of favorable precedent, petitioners have offered little more than a desired result in search of a supporting theory. Granting the petitions in this case would serve only to disturb the strong consensus that has emerged among the circuits under the guidance of *United Foods*. Certiorari accordingly should be denied.

STATEMENT OF THE CASE

1. Respondent Livestock Marketing Association (LMA) is an association of livestock markets, principally auctions, whose members collect and remit tens of millions of dollars in "beef checkoff" assessments every year. Respondent WORC is an association of grassroots organizations that seek to protect family farms. Respondents Bob Thullner, Johnnie Smith, Pat Goggins, Herman Schumacher, and Jerry Goebel are individual cattle producers subject to the mandatory assessments imposed by the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.* (Beef Act). Although petitioners incorrectly suggest otherwise, because these mandatory assessments are directly linked to respondents' source of livelihood, they have no meaningful opportunity to avoid them. Pet. App. 11a.

The Beef Act is "not imposed as part of a statute or marketing order that comprehensively regulates the

commodity." Petition of U.S., *United States v. United Foods*, No. 00-276 (Aug. 2000) at 13. The cattle production industry is not characterized by collective action. Rather, it is characterized by a free market, and governed by the independent choices of almost one million individual farmers and ranchers and the cyclical laws of supply and demand. Pet. App. 54a. The producers in this case raise cattle sold on the free market at local livestock auctions in South Dakota and Montana. They are strong believers in the superiority of the grain-fed, United States beef that they raise, which they know to be more tender, tastier, healthier, and of higher quality than imported foreign beef, which tends to come from grass-fed animals raised using inferior methods. These plaintiff producers are in favor of requiring beef sold in our supermarkets and restaurants to be labeled according to its country of origin. They also believe that if any national promotion is to be funded by producers, it should expressly market their United States beef as a superior product, to the exclusion of all other beef, so that a specific demand for United States beef may be cultivated among consumers.

2. In 1976, Congress enacted the Beef Research and Information Act, which created a voluntary beef promotion program for cattle producers. Pursuant to this statute, Congress sought "[t]o enable cattle producers to establish, finance, and carry out a coordinated program of research, producer and consumer information, and promotion to improve, maintain, and develop markets for cattle, beef, and beef products." Pub. L. 94-294 (May 28, 1976), 90 Stat. 529. In 1985, Congress enacted the Beef Promotion and Research Act of 1985, extending the original Act and making its assessments against cattle producers mandatory. Pub. L. 99-198, Title XVI, § 1601 (Dec. 23, 1985), 99 Stat. 1354. Legislative history indicates that the Beef Act

was enacted as a "self-help" program for the beef industry, enabling it to marshal its own resources and "devise its own strategies" to increase beef sales while avoiding the intrusiveness of government regulation and unpopular government handouts. *See, e.g.,* Report of Committee on Agriculture, Beef Research and Information Act, H.R.Rep. No. 452, 94th Cong., 1st Sess. 3 (1975); CA App. 415.

a. The Beef Act establishes a multi-tiered procedure utilizing existing state and national beef industry organizations to finance and implement a program of beef promotion and market research. 7 U.S.C. §§ 2901(a)(5), (b), 2904(4)(D), (5), (6). The Beef Act neither authorizes nor permits any funding from the United States government. Instead, its activities are financed entirely by mandatory assessments on all cattle producers and beef importers equivalent to one dollar per head on each sale of cattle or imported beef in the United States. 7 U.S.C. § 2904(8)(C). The Beef Act authorizes the Secretary of Agriculture to issue a Beef Promotion and Research Order and to establish a Cattlemen's Beef Board for its administration. 7 U.S.C. §§ 2903, 2904(1); 7 C.F.R. § 1260.101 *et seq.* These activities were originally authorized in 1987 by a majority of cattle producers voting in a referendum. 7 U.S.C. § 2906. Cattle producers are also empowered to terminate their checkoff program by referendum. 7 U.S.C. § 2906(b). Upon termination, producers receive refunds of all existing unspent checkoff revenues. 7 U.S.C. § 2907(a).

b. The Cattlemen's Beef Board is an independent organization made up of 111 individual domestic cattle producers and importers of foreign beef who direct and administer beef checkoff funds. 7 U.S.C. § 2904(1). Beef Board members are not government officials, but rather are beef industry volunteers nominated by existing private beef industry organizations from various states and

approved in slate fashion by the Secretary. 7 U.S.C. § 2904(1). The Beef Board is charged with administering the Beef Order. 7 U.S.C. § 2904(2). All promotion and other activities, expenses, and staff of the Beef Board are funded entirely by mandatory assessments, and involve no appropriated government or taxpayer funds. The Beef Board has a Chief Executive Officer and issues annual reports to its cattle producer "investors." CA App. 243-62.

c. The Beef Board's activities to promote and advertise beef are selected and developed by the Beef Promotion Operating Committee. 7 U.S.C. § 2904(4)(B), (C). By law, the Operating Committee serves as an independent body, reviewing projects submitted by industry members and determining which projects will receive checkoff funding. CA App. 236-37, 404; Trial Tr. 63, 230-32. Checkoff programs selected by the Operating Committee become effective upon approval of the budget by the Beef Board and the Secretary. 7 U.S.C. § 2904(4)(C). The Operating Committee is composed of 10 members elected by the Beef Board from its own membership and "10 producers elected by a federation that includes as members the qualified State beef councils." 7 U.S.C. § 2904(4)(A); 7 C.F.R. § 1260.161. That "federation" is, in actuality, the checkoff division of the National Cattlemen's Beef Association (NCBA). The NCBA is a private trade and political lobbying association of cattle producers that enjoys a virtual monopoly on the Beef Board's contracts for implementing and carrying out the activities authorized by the Act.[1] Only

[1] Pet. App. 32a. The NCBA has annual revenues of $62,500,000. Approximately $54,400,000, or 87 percent, comes from checkoff dollars that all United States cattle producers, including those who are not NCBA members, are compelled to pay. Trial Tr. 62. This statutorily

(Continued on following page)

about 33,000 of the almost one million cattle producers who pay the beef checkoff belong to the NCBA. CA App. 558. The NCBA was created as the result of a merger when the National Cattlemen's Association absorbed the pre-existing federation of state beef councils described in the Act so that the beef industry could speak with "one voice." Trial Tr. 341-42.

d. Pursuant to the Act, USDA conducts general oversight of the program and ratification of producer-selected expenditures to ensure compliance with statutory provisions. 7 U.S.C. § 2904(6)(B). USDA is not permitted to spend government funds for this ministerial oversight. All such expenses are reimbursed by private checkoff funds as required by the Act. Despite any contrary implication in petitioners' briefs, USDA does not initiate, create, devise, fund, or implement any of the checkoff promotion or other activities. 7 U.S.C. § 2904(6)(B). All proposals for messages to be disseminated with checkoff dollars are formulated by private beef industry contractors. Neither USDA nor the government have any power to select messages or spend checkoff dollars. All such decisions are made by cattle producers themselves. Although these fully-formulated checkoff projects typically "become effective on approval of the Secretary," such approval is pro forma so long as the project does not violate the Act, and implementation of projects frequently begins prior to such approval. 7 U.S.C. § 2904(4)(C), (6)(B); CA App. 427, 431, 450; Trial Tr. 230-32, 371.

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mandated financial support for a private organization exists even though the NCBA advances policies that respondents, among others, believe are harmful to the small, independent cattle producer.

3. In fiscal 2001, beef checkoff assessments totaled $86,099,403. Checkoff dollars are primarily collected by livestock markets where cattle are sold. In the 45 states that have state beef councils, the livestock markets then remit those dollars to the state beef councils. Fifty cents of each dollar is required by law to be sent by the state beef councils directly to the Beef Board, which in fiscal 2001 amounted to $38,629,822. Importers of foreign beef contributed an additional $8.8 million. Because both beef importers and United States cattle producers are required to pay, checkoff-funded projects do not make any distinction between United States beef and imported foreign beef. While United States beef can be specifically promoted in foreign countries, where it is widely acknowledged as the best beef in the world, use of checkoff dollars to promote United States beef domestically is forbidden – only the generic product "beef" can be promoted in the United States. The record establishes that approximately 85 to 90 percent of the Beef Board's checkoff revenues are spent on this generic promotion, with more than 50 percent of total revenues spent specifically on paid generic advertising.[2] Thus, as with the Mushroom Act, the principal object of the Beef Act is speech itself. Pet. App. 11a.

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[2] Trial Tr. 280; Pet. App. 47a. Pursuant to the Act, the term "promotion" means "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. § 2902(13). Only 10 to 12 percent of checkoff dollars remitted to the Beef Board is expended on beef research. Pet. App. 47a. This research component is statutorily designated for marketing research, product development, and related activities "designed to strengthen the beef industry's position in the marketplace." 7 U.S.C. §§ 2901(b), 2902(15); 7 C.F.R. § 1260.169(b).

Respondents disagree with the "one voice" approach to the cattle industry promoted by the NCBA. On constitutional grounds, they object to the general content of the generic promotion that they are compelled to support through the Beef Act. As producers of United States cattle, they would like to convey the message that United States beef is superior to imported foreign beef. They object that their mandatory assessments are used to disseminate a contrary message, one that promotes beef as a generic commodity and makes no distinction between United States beef and imported foreign beef. Respondents believe that such generic promotion has increased beef importation, supplanting domestic production and acting to suppress market prices obtained by United States cattle producers. They believe that by being required to pay for the generic promotion of beef, rather than only United States beef as they desire, they are actually being compelled to subsidize their own demise. Respondents therefore object on political, ideological, and economic grounds to the messages conveyed by checkoff dollars. They also object to forced association with the NCBA and its political positions through the payment of mandatory assessments that are funneled to that private organization.

While many producers have objected to the Act since its inception, by 1998 frustrations reached a boiling point as producers found themselves paying the checkoff on cattle sold at prices that did not even cover the costs of production. With the assistance of LMA, these producers began circulating petitions seeking a referendum on continuation of the checkoff. In response to the petition drive, the Beef Board significantly increased expenditures on "producer communications," or political messages supporting the checkoff and discouraging cattle producers

from supporting a referendum. Despite this illegal opposition, in November of 1999, LMA submitted more than 145,000 petition signatures from cattle producers in support of a referendum. For a period of fourteen months after receiving these petitions, the Secretary failed to act to validate them and schedule a referendum vote. Pet. App. 33a. On December 29, 2000, respondents brought this action as a challenge to both the Secretary's inaction and the Beef Board's aggressive "producer communications" campaign. On February 23, 2001, following a hearing, the district court granted a preliminary injunction barring the use of checkoff funds to promote the checkoff and oppose a referendum. *See Livestock Marketing Ass'n v. USDA*, 132 F.Supp.2d 817, 829-32 (D.S.D. 2001) (*LMA I*). The parties initiated discovery in preparation for trial of the referendum issues.

After this Court issued its decision in *United Foods*, respondents were permitted to amend their complaint to include broader First Amendment claims. A trial on those claims was held in Aberdeen, South Dakota, on January 14-15, 2002. On June 21, 2002, the district court rejected petitioners' claim that the beef checkoff constituted "government speech" and held that the Beef Act was unconstitutional pursuant to *United Foods*. Pet. App. 56a-60a. The district court issued an injunction enjoining any further collection of mandatory assessments, which was subsequently stayed pending appeal. Pet. App. 60a.

4. The Eighth Circuit affirmed. First, the court of appeals independently reviewed the entire record and agreed with the district court's findings on all crucial facts. Pet. App. 11a. It also agreed that the Beef Act is, in all material respects, identical to the Mushroom Act at issue in *United Foods*, and that its principal object is speech

itself. Pet. App. 11a. The Eighth Circuit then addressed petitioners' prime contention that the Beef Act is immune from First Amendment scrutiny as the result of the government speech doctrine. It began by noting that this doctrine clearly does not provide immunity for all types of First Amendment claims. Pet. App. 16a. Rather, it stands for the general proposition that, "when the government speaks in its role of the government, it may be immune from First Amendment challenge based upon its choice of content." Pet. App. 16a-17a (citing *Keller v. State Bar,* 496 U.S. 1, 12-13 (1990); *Rust v. Sullivan,* 500 U.S. 173, 192-95 (1991)).

The Eighth Circuit observed that this case does not involve a challenge to a decision concerning the content of government speech, but rather to the government's authority to compel respondents to support speech with which they personally disagree, a form of "government interference with private speech." Pet. App. 17a. As the court explained, "[t]he two categories of First Amendment cases – government speech cases and compelled speech cases – are fundamentally different." Pet. App. 17a (citing *Board of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 234-35 (2000)). The court held that this case involved compelled speech and not government speech. Pet. App. 17a-19a.[3] Moreover, even if the Beef Act were to be characterized as government speech, "a determination

[3] At various points, petitioners inconsistently claim that the Eighth Circuit both held and did not hold that the Beef Act's generic promotion is not government speech. *Compare* Fed. Pet. 11 ("In holding that the generic promotion conducted under the Beef Act is not government speech . . . ") *with* Fed. Pet. 18 ("the Eighth Circuit did not hold that the generic advertising at issue is not government speech").

that the expression at issue is government speech does not preclude First Amendment scrutiny in the compelled speech context." Pet. App. 23a n.9 (citing *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977)). As a result, the Eighth Circuit's analysis was governed by this Court's line of compelled speech precedents. Pet. App. 19a (citing *United Foods; Keller; Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

The Eighth Circuit proceeded to explain that in compelled speech cases, this Court "has traditionally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified." Pet. App. 19a. (citing *Keller; Wooley*). It observed that in *United Foods*, this Court did not directly address whether such a test was applicable because it had no need to do so: the compelled assessments were unconstitutional under *any* of this Court's precedents. Pet. App. 20a (quoting *United Foods*, 533 U.S. at 409-10). Although the court of appeals proceeded to explain that a "balancing-of-interests" test analogous to the standard articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), would, in a close case, be the proper standard to apply, it correctly concluded that this Court had already resolved the question in *United Foods*. Pet. App. 21a-28a. This Court's unequivocal holding in that case, invalidating on identical constitutional grounds an act and order identical to the Beef Act and Order in all material respects, was therefore controlling. Pet. App. 26a ("In the case at bar, however, we need not, ourselves, engage in such a line-drawing exercise. The Supreme Court has already drawn the relevant line for us"). Because the principal object of the Beef Act rendered it unconstitutional, and because Congress had clearly expressed its intent by specifically deleting a pre-existing

severability provision, the Eighth Circuit affirmed the district court's order striking down the act in its entirety. Pet. App. 29a-30a.

ARGUMENT

In *United Foods*, this Court held that the government may not underwrite and sponsor speech with a certain viewpoint using special subsidies compelled from a designated class of persons, some of whom object to the idea being advanced. The Eighth Circuit in this case dutifully applied that controlling decision. During the *United Foods* litigation, the government acknowledged that the Mushroom and Beef Acts are "substantively identical" and that the "orders implementing those programs are also identical in all pertinent respects." Reply Brief of U.S., *United States v. United Foods*, No. 00-276 (Nov. 2000) at 6. It surely should come as no surprise that *United Foods* has resulted in the circuit courts striking down substantively identical statutes, like the Beef Act, based upon that controlling analysis. Petitioners' only identifiable argument not expressly resolved, foreclosed, or rendered immaterial by *United Foods* is their suggestion, which was not raised at trial or in the court of appeals in that case, that generic commodity promotion funded by mandatory producer assessments is government speech for which there should be complete immunity from the First Amendment.

This case is an exceedingly poor vehicle to delve into the substantially unexplored concept of government speech. Petitioners' proffered theory for constitutional immunity is essentially one of form over substance. They suggest that the government may freely circumvent the First Amendment by placing a sufficient number of political controls

over programs that would be otherwise unconstitutional so that the expression at issue is somehow transformed into its own. Petitioners' argument does not even squarely address, let alone refute, the Eighth Circuit's central holding in this case that where individuals are unconstitutionally compelled to support speech with which they disagree, that element of unconstitutional compulsion preempts a formalistic or semantic debate over who is technically "speaking," or has greater control or possessory interest over the content of the expression. This Court should not grant certiorari where petitioners are not prepared to address the Eighth Circuit's analysis directly. Petitioners' argument is illogical on its own terms and irreconcilable with this Court's existing compelled speech precedents. Since *United Foods*, the Eighth, Sixth, Fifth, and Third Circuits have produced uniform results in rejecting it. No circuit court has reached a contrary result. Certiorari should therefore be denied.

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE BEEF CHECKOFF PROGRAM IS NOT GOVERNMENT SPEECH AND IS COMPELLED SPEECH THAT VIOLATES THE FIRST AMENDMENT.

A. Generic beef promotion is not government speech.

As the Eighth Circuit held, when the Beef Act compels respondents to support speech to which they object, the result is not government speech, but rather a form of "government interference with private speech." Pet. App. 17a. This holding is entirely sound. The government speech doctrine has its genesis in the notion that an individual taxpayer may not raise a First Amendment challenge to the payment of taxes or the government's use

of tax dollars. *See Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). From this basic concept, a line of discussion has developed in several cases implicitly recognizing, almost entirely in dicta, that where the government speaks for itself by funding and promoting its own policies and positions, its speech may be exempt from the First Amendment.

This Court's leading case on the subject, *Rust v. Sullivan*, was only identified in subsequent decisions as exemplifying speech by the government. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). None of this Court's post-*Rust* cases that allude to government speech actually apply that concept to preempt constitutional rights. *See id.*; *Southworth*, 529 U.S. at 235; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-35 (1995); *Keller*, 496 U.S. at 11-13 (preceding *Rust*). As a result, petitioners have attempted to construct their government speech claim inferentially, without the benefit of favorable precedent directly on point. Under any of this Court's precedents, generic beef promotion under the Beef Act is not constitutionally immune "government speech," but rather government facilitation of private beef industry speech that objecting cattle producers are unconstitutionally compelled to support.

1. All four circuit courts to have considered petitioners' government speech argument have rejected it. In the present case, of course, the Eighth Circuit held that compelled subsidization of generic promotion under the Beef Act does not constitute government speech, but government interference with private speech. Pet App. 17a. Similarly, in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), the Sixth Circuit held that promotional activities funded through the Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. § 4801 *et seq.* (Pork Act) amounted to

private expression, rather than government speech. As the Sixth Circuit explained, "the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private." 348 F.3d at 162.

The Fifth Circuit, as well, recently relied on this Court's precedents to reject a contention that compelled assessments to the state-enacted Louisiana Alligator Resource Fund were unconstitutional, holding that "the generic marketing at issue is not government speech, but government facilitation of the private speech of fur and alligator harvesters." *Pelts & Skins, LLC v. Landreneau*, No. 03-30523 at 11 (5th Cir. April 2, 2004). As the Fifth Circuit explained:

> [I]n this case we confront a program in which the government uses its authority to exact fees from private individuals, then facilitates the use of those fees to express a message designed to benefit private commercial interests. This sort of program is not government speech.

Id. at 16.

In addition, the Third Circuit has twice held that generic commodity promotion programs do not constitute government speech. In *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), it held that the Beef Act was not government speech because, among other factors, it was funded solely by the beef industry and its promotional messages were attributed to cattle producers. As the court explained, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular

message associated with that group, the government has directly focused its coercive power for expressive purposes." *Id.* That element of targeted compulsion weighed against concluding that the speech at issue was that of the government, regardless of how USDA oversight under the Beef Act was characterized:

> This sort of funding scheme, with its close nexus between the individuals and the message funded, more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locuters for a distinguishable segment of the population, i.e., the employees, or the *Wooley* case, where the state "require[d] an individual to participate in the dissemination of an ideological message by displaying it on his property in a manner and for the express purpose that it be observed and read by the public," . . . regardless of whether the state-issued license plates constituted "government speech."

Id. at 1132-33. As a result, the Third Circuit concluded that "the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'" *Id.* at 1132.

More recently, in *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), the Third Circuit again rejected petitioners' argument that generic commodity promotion is government speech when it invalidated the Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* (Dairy Act). The Third Circuit relied upon its earlier holding in *Frame* on the government speech issue, explaining that "[a]though this court's First Amendment discussion and

ultimate holding in *Frame* have been abrogated by *Glickman* and *United Foods*, none of the Court's subsequent decisions regarding 'government speech' undermine our analysis of that issue in *Frame*." *Id.* at 274. It accordingly held that the Dairy Act involved private expression, not government speech, and "thus is not immune from First Amendment scrutiny." *Id.* Thus, five circuit court decisions have now addressed petitioners' government speech argument, and it has been soundly rejected in each. Certiorari should not be granted where unanimity exists among the circuits.

2. In rejecting petitioners' government speech argument, the Eighth Circuit and other circuit courts relied upon this Court's controlling decision in *Keller*, 496 U.S. at 11-13, in which this Court unanimously rejected an assertion that mandatory assessments against attorneys used to fund expressive activities by the State Bar, a legislatively created entity, constituted "government speech" for purposes of the First Amendment. *Keller* is this Court's most substantive treatment of what does not constitute government speech, is the only such decision to examine government speech within the context of compelled speech, and specifically rejects its applicability to legislatively enacted mandatory assessments that target discrete groups to pay for objectionable speech. Petitioners have not successfully distinguished this Court's rejection of government speech immunity for the unconstitutional assessments in *Keller* from the otherwise unconstitutional assessments at issue in this case. Certiorari should not be granted where this Court's existing precedents efficiently control resolution of the question presented.

3. When the government speaks, it is usually readily apparent that the government itself is the literal speaker or that a government message has been selected and

funded by the government. *See, e.g., Rust*, 500 U.S. at 198-99. Unlike those circumstances, generic beef promotion in this case is funded by cattle producers, associated with and attributed to cattle producers, and designed to benefit the private commercial interests of the beef industry. Petitioners' argument that establishing governmental control over expression provides immunity from the First Amendment unpersuasively places administrative structure over substance and effect. If accepted, petitioners' claim that government oversight is coextensive with government speech would allow the government to nullify the First Amendment at will simply by attaching nominal indicia of control to programs that are otherwise unconstitutional under settled law. In effect, the stronger the government censorship, the more exempt it would become from First Amendment scrutiny. The Eighth Circuit properly rejected petitioners' invitation to reorder this Court's existing precedents with such sweeping constitutional implications, simply to resuscitate a generic commodity promotion program that is substantively identical to one so recently held unconstitutional in *United Foods*.

a. The Eighth Circuit's rejection of petitioners' government speech argument is consistent with the general principle, identified in this Court's decisions discussing government speech, that any purported constitutional latitude is inherently derived from the government's right to direct public funds and implement government-funded programs.[4] This Court has never accepted the proposition of constitutional immunity where

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[4] *See Rust*, 500 U.S. at 198-99; *Rosenberger*, 515 U.S. at 833; *Southworth*, 529 U.S. at 229; *Keller*, 496 U.S. at 10-11; *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring).

the government, rather than using its own funds to deliver its own message, has instead compelled a targeted group to pay for the dissemination of a particular message specifically associated with that group to which some members object. *See Keller*, 496 U.S. at 10-11; *United Foods*, 533 U.S. at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors"). The Eighth Circuit in this case accordingly has not, as petitioners theatrically suggest, "called into question the government's ability to convey its own message to the public." Fed. Pet. 11. If the government itself truly wished to engage in generic beef promotion, Congress is obviously free under this Court's precedents to appropriate from its general revenues to do so.

b. Given the substantial record developed at trial below, the Eighth Circuit was plainly correct in concluding that beef industry activities facilitated by the Beef Act are not fairly characterized as government speech. Petitioners are now claiming a government speech exemption from the First Amendment for a program which until very recently was touted as being controlled by producers. Since the Beef Act's inception, cattle producers have enjoyed assurance that the beef checkoff is their "self-help" industry program, funded by cattle producers, led by cattle producers, and established for their benefit. CA App. 236; Trial Tr. 250. Checkoff promotion is universally attributed to cattle producers. No mention is ever made of the government or USDA. Trial Tr. 96. The Beef Board has repeatedly confirmed that the content of its activities is a function of the decisions of cattle producers, not the government. CA App. 244, 449, 540. Only after this Court issued its decision in *United Foods* did petitioners completely reverse field and suddenly postulate that "Beef: It's

What's For Dinner" advertisements and other promotion "funded by America's Beef Producers" and copyrighted by "National Cattlemen's Beef Association and Cattlemen's Beef Board" are messages from the United States government. CA App. 51. The lower courts correctly rejected this suggestion as factually preposterous. Pet. App. 56a.

The government's role in checkoff activities is one of simple ministerial oversight to ensure statutory compliance, for which USDA is fully reimbursed. CA App. 431, 450; Trial Tr. 230, 244, 288, 370-71. The Beef Act does not permit the government to conceive, develop, edit, direct, or fund any checkoff message or program. Instead, the Act simply indicates that fully developed projects, conceived by cattle producers and beef industry representatives, "shall become effective on the approval of the Secretary." 7 U.S.C. § 2904(6)(B). This approval is pro forma so long as projects do not violate or exceed the authority of the Act. CA App. 431, 450; Trial Tr. 371. Certiorari should not be granted to exhume and reexamine the lower courts' plainly accurate factual assessment that USDA's "limited" oversight over beef industry activities does not transform generic beef promotion into government speech. Pet. App. 24a, 55a-57a.

c. In suggesting that the Beef Board should be considered a governmental entity that is entitled to abridge First Amendment freedoms with impunity, petitioners rely principally on this Court's decision in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). As the Eighth Circuit correctly recognized, however, *Lebron* is wholly inapplicable to this case. Pet. App. 18a n.5. The *Lebron* decision involved neither government speech nor compelled speech, but rather the alleged governmental suppression of political speech. *Lebron* simply made clear that the government, by resorting to corporate form, could not

evade the constraints of the First Amendment. 513 U.S. at 397-99. It expressly distinguished between treating a corporation as an agency of the government "for purposes of the constitutional *obligations* of Government *rather than the 'privileges* of the government,'" and held that the corporation's conduct in that case amounted to state action that violated the First Amendment. *Id.* at 399 (emphasis supplied).

The principle established in *Lebron* is that the government, in whatever form, is *constrained* by the First Amendment. That decision provides no support for the contrapositive proposition that by in some fashion resorting to corporate form, the government becomes immune from constitutional scrutiny and may freely abridge First Amendment freedoms by "compelling certain individuals to pay subsidies for speech to which they object." *United Foods*, 533 U.S. at 410. Thus, as the Eighth Circuit correctly held, *Lebron* speaks nothing to the present situation in which private individuals are unconstitutionally compelled to support objectionable speech, and stands for a premise that is the polar opposite of asserted First Amendment immunity.

d. In any event, petitioners' criticism of the lower courts' assessment of the degree to which USDA actually influences or controls generic promotion generated under the auspices of the Beef Act eludes the true issue in this case. As the Eighth Circuit recognized, a fact-bound assessment regarding the actual degree of governmental control is not ultimately dispositive on the larger question of government speech immunity. Pet. App. 23a n.9. Although the government frequently facilitates private speech, and oversees and constrains numerous areas of private expression, such oversight does not accomplish a transubstantiation of private speech into that of the government. *See San Francisco Arts & Athletics, Inc. v.*

U.S. Olympic Comm., 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government"); *Rosenberger*, 515 U.S. at 833 (explaining that student activities fund administered by state university did not involve government speech, but rather a governmental initiative designed to encourage and facilitate private speech); *Velasquez*, 531 U.S. at 542 (explaining that "the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message").

Regardless of how extensive USDA's oversight might be characterized, that the government has established some boundaries for private expression does not alter its essential character. Petitioners' suggestion that the government should be able to immunize itself from constitutional restrictions by *increasing* control over private expression cuts against the very heart of First Amendment freedoms. If adopted, it would reorder this Court's present conception of the government speech doctrine as a potential shield, protecting the government's inherent right to direct public funds, into that of a sword, permitting the violation of constitutional rights by controlling private speech and requiring objecting citizens to individually subsidize and endorse messages with which they disagree. The Eighth Circuit wisely declined to endorse such an ominous concept.

B. The beef checkoff program is compelled speech that violates the First Amendment.

1. Petitioners' assertion that labeling an action "government speech" conclusively negates the First

Amendment rights of those affected cannot be reconciled with this Court's bright line of compelled speech precedents in *Barnette*, *Wooley*, *Abood*, *Keller*, and *United Foods*. Even if one characterized generic beef promotion under the Beef Act as government speech, it still would not be immune from the First Amendment under this Court's compelled speech precedents. Pet. App. 23a n.9. As the Eighth Circuit properly observed, "[t]he two categories of First Amendment cases – government speech cases and compelled speech cases – are fundamentally different." Pet. App. 17a.

The unconstitutional compulsion of speech involves some state action that demands support from private individuals for speech with which they disagree. *See United Foods*, 533 U.S. at 410-11. Such activity is fundamentally inconsistent with the freedom of belief that lies at the core of all First Amendment guarantees. *See id.* The government speech doctrine clearly does not provide immunity from all types of First Amendment claims, nor do the cases suggest that when the government speaks, it is entirely immune from all types of First Amendment free speech claims. Pet. App. 16a (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-10 (2000)); *Velasquez*, 531 U.S. at 542 (explaining that "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however").

Although the government can obviously speak for itself in its role as the government, or even retain others for the purpose of communicating its messages that are funded with government revenue, *see Rust*, 500 U.S. at 192-95, it may not selectively compel private individuals or groups to fund, subscribe to, or advance speech favored by others or favored by the government. *See United Foods*, 533 U.S. at 411; *Keller*, 496 U.S. at 12-13. The constitutional right to be free from compelled speech is therefore

not automatically nullified by characterizing the offending message as that of the government. Pet. App. 16a-19a.

As the Eighth Circuit recognized, this principle is reinforced by this Court's decision in *Wooley*, 430 U.S. at 715-16, where the issue was whether objecting New Hampshire motorists could be compelled to convey the state motto, "Live Free or Die," on their state-issued license plates. Pet. App. 23a n.9. There is little doubt that this government-selected motto would constitute government speech, yet the chosen message was clearly not immune from First Amendment scrutiny. *See id.* at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message"). This principle is illuminated equally well by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), where this Court applied the First Amendment to strike down legislation compelling West Virginia public school students to recite the Pledge of Allegiance, the quintessential example of government speech.

Where, as here, the challenged activity veers from government speech, financed by general revenues, to forced speech, effected through compelled monetary contributions from a selected group with whom the speech is associated, one has crossed the Rubicon into the unconstitutional territory delineated by *Abood*, *Keller*, and *United Foods*. The Eighth Circuit therefore properly concluded that the analysis in this case is governed by this Court's compelled speech precedents. Regardless of whether it is characterized as government speech, generic commodity promotion funded by mandatory, targeted assessments against producers who object to the messages associated with them runs afoul of the First Amendment,

and petitioners' strained analogy to a disgruntled taxpayer objecting to taxes simply does not pertain.

2. Petitioners have abandoned their claim, advanced in the lower courts, that the constitutionality of the Beef Act is controlled by this Court's analysis in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), rather than *United Foods*. Rejection of their government speech argument accordingly affirms the Eighth Circuit's holding that the Beef Act unconstitutionally compels speech pursuant to the analysis set forth in *United Foods*. As an additional basis for certiorari, petitioners assert that the Eighth Circuit's conclusion that the Beef Act does not withstand intermediate First Amendment scrutiny under the standard articulated in *Central Hudson* is in conflict with the Third Circuit's pre-*United Foods* decision in *Frame*, 885 F.2d at 1134-37, creating a purported circuit split that requires this Court's intervention to resolve. This claimed basis for certiorari has been neatly dispelled by the Third Circuit itself in *Cochran*, 359 F.3d at 274, which post-dated the petitions. In striking down the unconstitutional Dairy Act, the Third Circuit held that its First Amendment analysis and ultimate conclusion in *Frame* had been abrogated by this Court's contrary decision in *United Foods*. *See Cochran*, 359 F.3d at 274. Thus, no viable circuit split remains on this issue, if indeed one ever existed post-*United Foods*.

Even had *Cochran* not made *Frame*'s abrogation explicit, petitioners' contention that the compelled assessments in this case are constitutional under *Central Hudson* is clearly incorrect, and has been foreclosed by this Court's decisions in both *Glickman* and *United Foods*. In *Glickman*, this Court held that it was "error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments

for promotional advertising," 521 U.S. at 474, and strongly suggested that *Central Hudson*, which involved a restriction on commercial speech, had no applicability in any case involving the compelled funding of speech. *Id.* at n.18. Instead, this Court explained that the "germaneness" test applied in *Abood* (and in *Keller*) would logically be the appropriate test for assessing the constitutionality of compelled speech in any similar context. *Id.*

Four terms later, in *United Foods*, after observing that the *Central Hudson* approach had been the subject of criticism, this Court held that it "need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 409-10. Thus, this Court determined that the mandatory assessments were unconstitutional under *any* applicable precedent, including the lesser protection afforded by *Central Hudson*.

Although the Eighth Circuit in this case concluded that, in its view, the *Central Hudson* test could be adapted for situations involving compelled commercial speech, it correctly acknowledged that in *United Foods*, this Court had already resolved the outcome produced by such an analysis by holding unconstitutional, under any of this Court's precedents, a program identical to the beef checkoff program in all material respects. Pet. App. 26a-28a. As a result, the Beef Act's compelled assessments cannot survive First Amendment scrutiny under any of this Court's precedents, including *Central Hudson*, without overruling *United Foods*, which petitioners have declined to ask this Court to do. This Court should not grant certiorari on a question rendered immaterial by controlling precedent.

II. THE LOWER COURTS PROPERLY INVALIDATED THE BEEF ACT IN ITS ENTIRETY AND ENJOINED FURTHER COLLECTION OF UNCONSTITUTIONAL ASSESSMENTS.

Lastly, petitioners have unpersuasively assailed the lower courts' grant of relief, suggesting that an injunction prohibiting continued enforcement of an unconstitutional law was overly broad. This issue is completely unworthy of certiorari review. Both circuit courts to consider the issue of remedy when a commodity promotion program has been held unconstitutional pursuant to *United Foods* have granted the identical relief. Pet. App. 28a-30a, 57a-59a (invalidating Beef Act in its entirety and entering nationwide injunction); *Michigan Pork Producers*, 348 F.3d at 163-64 (invalidating Pork Act in its entirety and entering nationwide injunction). In addition, the Third Circuit in *Cochran*, 359 F.3d at 280, recently reversed the district court's erroneous decision sustaining the Dairy checkoff and remanded with directions to enter a decree that the Act, not simply a portion thereof, was unconstitutional.

1. Petitioners claim that relief from the unconstitutional assessments should only apply to the five cattle producers who testified at trial, and should not apply on a nationwide basis. This suggestion is consistent with USDA's strategy of pretending that *United Foods* was never decided. Since that decision in June of 2001, USDA has defied this Court by continuing to promulgate new marketing orders virtually identical to the program held unconstitutional in *United Foods*. *See, e.g.*, Lamb Promotion, Research and Information Order; Final Rule, 67 Fed. Reg. 17848 (No. 124) (April 11, 2002) (promulgating lamb order even where prior referendum among lamb producers rejected checkoff promotion, 62 Fed. Reg. 34,683 (June 27, 1997)). Meanwhile, hundreds of millions of dollars of

unconstitutionally compelled checkoff payments continue to be collected with the inscrutable rationalization that generic commodity promotion might be government speech. This, despite this Court's longstanding admonition that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Petitioners' theory that each individual cattle producer who objects to a program that is unconstitutional under this Court's settled precedents should be required to prosecute a lawsuit in order to preserve their First Amendment rights does not have resonance. The lower courts correctly determined that all cattle producers, not simply the named plaintiffs, should be entitled to the benefit of *United Foods*.

2. Petitioners also urge that relief from the unconstitutional Beef Act should be limited to assessments allocated to generic promotion, exempting collateral checkoff activities such as administrative expenses and marketing research. Congress, however, intended otherwise, acting to expressly delete a previously existing severability provision, as noted by the court of appeals. 7 U.S.C. § 2901 (Historical and Statutory Notes); Pet. App. 29a. As this Court has held, "[t]he inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999).

As with the unconstitutional mushroom checkoff, the principal object of the Beef Act is speech itself. Pet. App. 11a. The factual record demonstrates that approximately 85 to 90 percent of the Beef Board's checkoff revenues are spent on generic beef promotion, with more than 50 percent spent specifically on paid advertising. Trial Tr. 280; 7 U.S.C. § 2902(13). Courts do not have authority to

"rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935). If core activities are constitutionally invalid, there is no reason to continue extracting funds from producers and directing them through an arcane and complex administrative structure that has been stripped of its central purpose. Such a remedy would judicially reorder the Beef Act into something that it was never intended to be.

It is inconceivable that Congress would have enacted a national scheme of mandatory assessments on every live cattle transaction in the United States, co-opting hundreds of millions of dollars in cattle producer income and funneling it through a chain of state and national beef industry organizations, councils, boards, and committees for the sole purpose of conducting isolated marketing research related to beef. *See id.*; *Mille Lacs Band*, 526 U.S. at 191 (holding that Presidential Order, adjudged under same standard as legislative enactments, was not severable because it "embodied a single, coherent policy" and was intended "to stand or fall as a whole"). United States cattle producers did not vote to adopt, and would never have initially adopted, a program of mandatory assessments that did not have as its central purpose the promotion of beef. 7 U.S.C. § 2906(a). Because the principal object of the Beef Act is "not permitted under the First Amendment," *United Foods*, 533 U.S. at 416, and given Congress's actions ensuring that the Beef Act's provisions could not be construed as severable, the lower courts acted properly in invalidating the Act as a whole.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.[8]

Respectfully submitted,

RONALD A. PARSONS, JR.
SCOTT N. HEIDEPRIEM
JOHNSON, HEIDEPRIEM, MINER, MARLOW & JANKLOW, LLP
431 N. Phillips Avenue
Suite 400
Sioux Falls, SD 57104
(605) 338-4304

PHILIP C. OLSSON
Counsel of Record
RYAN W. STROSCHEIN
OLSSON, FRANK AND WEEDA, P.C.
1400 Sixteenth Street, N.W., Suite 400
Washington, D.C. 20036-2220
(202) 518-6366

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[8] Should, however, this Court elect to grant the petition in this case or the corresponding petition involving the Pork Act filed in *Veneman v. Campaign for Family Farms*, No. 03-1180 (Feb. 2004), respondents respectfully suggest that both cases be heard, so that in considering the broader context of both statutes and attendant factual records, the constitutionality of generic commodity promotion programs in which the principal object is speech itself can be settled once and for all.

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No. 03-1165

IN THE

Supreme Court of the United States

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

Respondents do not even attempt to deny that this case involves a recurring issue of national importance. Of course, it is difficult to deny the significance of a case when the Solicitor General, thirty States plus Puerto Rico, and some forty-eight industry amici have all urged this Court to grant review.[1] The Eighth Circuit has declared "unconstitutional and unenforceable" an Act of Congress. Pet. App. 28a. That alone makes this an important case, but there is more—much

[1] *See* Brief of Texas, *et al.* as *Amicus Curiae* in Support of Petitioners; Brief of 48 Cattle and Agricultural Associations as *Amicus Curiae* in Support of Petitioners.

more. In striking down the Beef Act in its entirety, the Eighth Circuit invalidated an important government program that Congress expressly determined was "in the public interest," 7 U.S.C. § 2901(b), and that, at a time of increased public concern over food safety, is more vital than ever. At the same time, the Eighth Circuit cast doubt on the constitutionality of scores of similar federal and state programs. The Eighth Circuit's decision, moreover, is contrary to numerous of this Court's precedents, and directly conflicts with the decision of another federal circuit involving the same Act of Congress. There is no question that this case meets *all* of this Court's customary criteria for certiorari. *See* S. Ct. Rule 10.

1. Respondents acknowledge, as they must, the gravity of invalidating an Act of Congress. *See* Opp. 2. Attempting to dismiss concerns in this case, respondents contend that the Eighth Circuit's decision "was pre-ordained by *United Foods*," and chide petitioners for "refus[ing] to accept * * * this Court's decision in that case." *Id.* In fact, it is respondents who refuse to accept that *United Foods* expressly left open the government speech and *Central Hudson* issues presented here. *See United States* v. *United Foods, Inc.*, 533 U.S. 405, 408, 416-417 (2001); *see also Pelts & Skins, LLC* v. *Landreneau*, 2004 WL 725275, at *4 n.12 (5th Cir. 2004) ("In *United Foods*, the Court intimated that the government speech doctrine might have been applicable * * * but expressly reserved this question because the argument was not raised or addressed in the court of appeals."); *Cochran* v. *Veneman*, 359 F.3d 263, 277 (3d Cir. 2004) ("the Court has left open the question whether *Central Hudson*[] * * * applies to cases involving compelled commercial speech") (emphasis omitted). Despite respondents' repeated efforts to demonstrate that the Eighth Circuit merely "applied [a] controlling decision," Opp. 12, *United Foods* is not dispositive here. The Eighth Circuit's "exercise of the grave power of annulling an Act of Congress" fully merits this Court's review. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

2. Respondents note that, since the Eighth Circuit issued its decision in this case, two other circuit courts have declared unconstitutional similar federal statutes and another has invalidated a similar state program. Opp. 14-15. But the fact that two additional Acts of Congress and a state statute have been struck down should give this Court pause, not comfort. This Court's decision in *United Foods* has already resulted in a wave of litigation challenging various state and federal agricultural commodity promotion and research programs. *See* Pet. 25-26; Brief of Texas, *et al.* 17 & n.20. Until this Court resolves the issues left open by *United Foods*, such litigation will continue to proliferate.

Moreover, the decisions issued by the lower courts thus far demonstrate that this Court's guidance is sorely needed. Even among circuit courts, the standards applied have varied widely. The Eighth Circuit held that, as a categorical matter, the government speech doctrine does not even apply in this case because it involves the compelled funding of speech. *See* Pet. App. 15a-19a. The Third, Fifth, and Sixth Circuits, by contrast, declined to follow the Eighth Circuit's approach and instead considered whether the generic advertising at issue was government speech. *See Cochran*, 359 F.3d at 273-274; *Pelts & Skins*, 2004 WL 725275, at *4-*6; *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157, 161-162 (2003). Indeed, the Fifth Circuit expressly disagreed with the Eighth Circuit's conclusion that "the government speech doctrine [is] categorically inapplicable to compelled subsidy cases," reasoning that this Court's "treatment of compelled subsidy challenges convinces us that the government speech doctrine is at least potentially applicable to this general category of cases." 2004 WL 725275, at *4 n.13.

The Eighth Circuit also concluded that, "had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case." Pet. App. 21a. The Sixth

Circuit, meanwhile, found *Central Hudson* clearly "inapplicable" to cases involving the compelled funding of speech. 348 F.3d at 163. The Fifth Circuit, observing that "other circuits have diverged on this question," stated that it "doubt[ed]" that *Central Hudson* applies in this context. 2004 WL 725275, at *8 n.21. The Third Circuit purported to determine whether *Central Hudson* applies, but in the end simply chose to pass on the matter—citing this Court's apparent "reluctance" to "enter the controversy over the applicable scrutiny for compelled commercial speech cases." 359 F.3d at 276-279. Such confusion and disuniformity will persist until this Court resolves the government speech and *Central Hudson* issues left open in *United Foods*. This case provides a timely and ideal vehicle for this Court to resolve those issues, end the confusion, and stem the tide of litigation that threatens to flood the lower courts.

3.a. The Eighth Circuit's decision is contrary to this Court's precedents on the government speech doctrine. *See* Pet. 14-20. In their brief in opposition, respondents betray as much confusion over the doctrine as the Eighth Circuit itself. Respondents contend, for example, that "[e]ven if one characterized generic beef promotion under the Beef Act as government speech, it still would not be immune from the First Amendment." Opp. 23. In their view, the Eighth Circuit "properly observed [that] '[t]he two categories of First Amendment cases—government speech cases and compelled speech cases—are fundamentally different.' " *Id.* (quoting Pet. App. 17a) (second alteration in original). That conclusion finds *no* support in this Court's precedents, *see* Pet. 15-19, and not one of the other circuit courts to address the government speech issue in this context has endorsed it. *See, e.g.*, *Pelts & Skins*, 2004 WL 725275, at *4 n.13 ("the government speech doctrine is at least potentially applicable to this general category of cases"). Thus, if the speech under the Beef Act is government speech—and it plainly is—then it is immune from First Amendment challenge.

Respondents also contend that individuals cannot be "unconstitutionally" compelled to support speech with which they disagree, regardless of "who is technically 'speaking.' " Opp. 13. That assumes, however, that individuals are being "unconstitutionally" compelled to support speech in the first place. As this Court has made clear, the government may spend "funds raised * * * for speech and other expression to advocate and defend its own policies." *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000); *see also Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates *public funds* to promote a particular policy of its own it is entitled to say what it wishes") (emphasis added). Thus, the government is plainly entitled to compel funding for its own speech, whether or not citizens agree with its message. Accordingly, whether the government is speaking is not a "formalistic or semantic debate," Opp. 13, but a question of constitutional significance.

Respondents further rely on *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). *See* Opp. 23-24. As explained, however, those cases are a far cry from this one, involving the compelled funding of a government program by those who, in Congress's judgment, "most directly reap the benefits of the program[]." 7 U.S.C. § 7401(b)(2). *See* Pet. 19. The Beef Act simply requires respondents to pay an assessment; it neither "compel[s] [them] to utter what is not in [their] mind[s]," *Barnette*, 319 U.S. at 634, nor makes them "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked respondents to express *their* support of beef promotion, as in *Barnette*, or to bear such a message on *their* property, as in *Wooley*. Respondents simply ignore the fact that this Court has already held that *Barnette* and *Wooley* and *all* the Court's "compelled speech case law [are] *clearly inapplicable*" to cases, like this, involving the compelled funding of a generic advertising

program. *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997) (emphasis added).

b. Respondents contend that the Eighth Circuit "was plainly correct" in concluding that the expressive activities conducted under the Beef Act "are not fairly characterized as government speech." Opp. 19. Respondents' brief contains no citation to the court's opinion, and there is none. As noted, the Eighth Circuit in fact never decided whether the generic advertising under the Beef Act is government speech, concluding instead that the government speech doctrine is categorically inapplicable to cases involving the compelled funding of speech. *See* Pet. App. 15a-19a; *Pelts & Skins*, 2004 WL 725275, at *4 n.13 ("The Eighth Circuit declared the government speech doctrine categorically inapplicable to compelled subsidy cases.").

In any event, the generic advertising conducted under the Beef Act is government speech. The general content of the speech—that beef is "a valuable part of human diet"—and the purpose of the speech—"to maintain and expand domestic and foreign markets and uses for beef"—are prescribed in the first instance by Congress. 7 U.S.C. §§ 2901(a)(1), (b). The specific messages are formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives. As the record in this case reflects, the Secretary actively participates in the formulation of the specific messages, and must give final approval to *every* message disseminated under the Beef Act. *See* 8th Cir. J.A. 453, 455-456, 460, 542, 545; Tr. 192, 198, 202, 215, 270, 305-308, 312-313, 359, 370, 384-385, 388. As the court concluded in *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002), "[b]y no means is the government's control over the checkoff-funded program *pro forma*." Thus, what is plainly at issue here is government promotion of its *own* message, not government regulation of the speech of *others*.

In attempting to demonstrate otherwise, respondents rely on *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). As we have explained, the Eighth Circuit's conclusion that government speech and compelled funding of speech cases "are fundamentally different," Pet. App. 17a, cannot be reconciled with this Court's decision in *Keller*, which specifically applied the government speech doctrine in the compelled funding context. *See* Pet. 17. Contrary to respondents' contention (Opp. 17), *Keller* is not controlling here. In *Keller*, the Court concluded that the State Bar was not like a typical government agency, which "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents." 496 U.S. at 12-13. That is quite unlike the case here, where the entities conveying the message to which respondents object—the Beef Board and the Operating Committee—were expressly created by Congress to further important government objectives through the formulation and communication of messages prescribed in the first instance by Congress "as a part of the democratic process" under the direct supervision and control of a politically accountable official, the Secretary of Agriculture. 496 U.S. at 12.[2]

Respondents acknowledge that "the government can obviously speak for itself * * * or even retain others for the purpose of communicating its messages," but contend that the government "may not selectively compel private individuals or groups to fund, subscribe to, or advance" govern-

---

[2] As the Federal petitioners have explained (Pet. 16-17), under this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Board and Operating Committee are government entities for First Amendment purposes. Respondents fail to offer a persuasive reason why *Lebron*'s consideration of whether an entity "is part of the Government," 513 U.S. at 400, should be regarded as "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). *See* Opp. 20-21.

ment speech. Opp. 23. *See id.* at 24 ("government speech" is "financed by general revenues"). As this Court has recognized, however, "[t]he government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties." *Southworth*, 529 U.S. at 229 (emphasis added). Accordingly, Congress's decision in this instance to impose what is akin to a modest user fee on those "who most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2), and who as a group have voted to fund the program, does not change the character of the speech here from government to private speech.

4. Respondents fail to dispel the conflict between the decision below and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). *See* Pet. 22-24. In *Cochran*, *supra*—which did *not* involve the Beef Act—the Third Circuit did not overrule *Frame*. Rather, the court concluded—erroneously—that *United Foods* had "abrogated" *Frame*. 359 F.3d at 274. In *Frame*, the Third Circuit held that the Beef Act survives scrutiny under the *Central Hudson* test for commercial speech—indeed, the court held that the Act survives scrutiny under an even *stricter* First Amendment standard. *See* 885 F.2d at 1134 n.12; *see also id.* at 1133-37. As the *Cochran* court itself observed, *United Foods* "left open whether *Central Hudson*[] * * * applies to cases involving compelled commercial speech." 359 F.3d at 277. *See also Pelts & Skins*, 2004 WL 725275, at *8 n.21 ("*United Foods* did not explain if or how the *Central Hudson* test applies to compelled subsidy cases"). Thus, *United Foods* did not somehow eviscerate *Frame*'s holding that the Beef Act survives scrutiny under *Central Hudson*. In concluding otherwise, the *Cochran* court improperly concluded that *United Foods* was ultimately dispositive of the *Central Hudson* analysis, just like the Eighth Circuit. *See* 359 F.3d at

279; Pet. App. 26a-28a. *Cochran* thus underscores, not diminishes, the need for this Court's review.[3]

5. In contending that the Eighth Circuit's invalidation of the *entire* Beef Act is "completely unworthy" of review, Opp. 27, respondents wholly ignore the conflicts with this Court's decisions. This Court has held that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). By (1) enjoining the collection of *any* assessments under the Act, even to fund research and education activities that respondents did *not* challenge, and (2) upholding a nationwide injunction that improperly allows cattle producers who support the checkoff to be "silenced by the dissenters," *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 773 (1961), the Eighth Circuit went far beyond what was necessary "to provide complete relief to the plaintiffs."

The Eighth Circuit also violated the well-established principle that "[a] court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (quotations and alterations omitted). *See* Pet. 20-22. In attempting to demonstrate otherwise, respondents contend that Congress "expressly" deleted a preexisting severability clause when it overhauled the Beef Act in 1985. Like the Eighth Circuit, however, respondents fail to cite *anything* suggesting that the omission of a severability clause in the 1985 Act was deliberate. *See* Pet. 21 n.7. The current Act is merely silent with respect to severability, and "not every silence is pregnant." *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quotation and alteration omitted).

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[3] Respondents erroneously assert that petitioners "have abandoned their claim" that the Beef Act is constitutional under *Wileman*. Opp. 25. As petitioners specifically noted, "[t]he Court's decision in *Wileman* * * * provides another basis for upholding the Beef Act." Pet. 23 n.8.

Respondents also contend that it is "inconceivable" that Congress intended the Act's research and education provisions to be severable in the event its promotion provisions were stricken. Opp. 29.[4] But Congress specifically enacted a "Beef Promotion *and* Research Act," the express purpose of which is to further important governmental objectives through "promotion *and* research," 7 U.S.C. § 2901(b) (emphasis added), and which specifically provides for the development of plans or projects of "research, consumer information, and industry information." *Id.* § 2904(4)(B). To conclude that the Act's research and education provisions are not severable would be to conclude that Congress did not consider those activities vitally important. The Act itself confirms that Congress did.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

* Counsel of Record

Counsel for Petitioners

---

[4] Respondents erroneously assert that 85 to 90 percent of checkoff revenues are spent on generic beef promotion. *See* Opp. 28. The record in this case shows that the actual figure is less than 60 percent. *See* Tr. 280-281; *see also* Decl. of Monte Reese in Support of Defs.' Mot. for a Stay Pending Appeal at 3 (Add. E) (citing J.A. 638) ("[i]n the past fiscal year, 58.3% of the Beef Board's expenses were for the Board's promotion programs").

Supreme Court, U.S.
FILED
AUG 20 2004
OFFICE OF THE CLERK

(16) (13)

Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX
VOL. 1

PAUL D. CLEMENT*
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

**Counsel of Record*
for Petitioner United States

LORANE F. HEBERT*
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

**Counsel of Record*
for Petitioner Nebraska Cattlemen

PHILIP C. OLSSON*
Olsson, Frank and Weeda
1400 Sixteenth Street, N.W.
Washington, D.C. 20036-2220
(202) 518-6366

**Counsel of Record*
for Respondents

PETITION FOR WRIT OF CERTIORARI FILED: FEB. 13, 2004
CERTIORARI GRANTED: MAY 24, 2004



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 02-2769

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ANN VENEMAN, SECRETARY OF AGRICULTURE, CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS-APPELLANTS

NEBRASKA CATTLEMEN, INC.; GARY SHARP; RALPH JONES, INTERVENORS-DEFENDANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
7/8/02	Civil Case Docketed. Dist. Ct. Office: Pierre (cyz) [02-2769]
	* * * * *
7/10/02	JUDGE ORDER: Appellants' motion for a stay of the district court's order pending appeal is granted. The appellants' motion for

DATE	PROCEEDINGS
	an expedited appeal is denied. The clerk will establish a briefing schedule in a separate order. [1537334-1] [1538260] [1537334-2] [1538260] (dlb) [02-2769]
	* * * * *
9/6/02	BRIEF FILED - Brief of Appellants - USDA, Ann Veneman and Cattlemen's Beef in 02-2769. 13,639 words w/addendum 10 copies - w/service 9/5/02 w/diskette. [02-2769] [1558939] (vla) [02-2769]
9/6/02	RECORDS received: Joint Appendix, consisting of 2 Volume(s) 3 copies for both case Nos. 02-2769 and 02-2832. [02-2769, 02-2832] (vla) [02-2769 02-2832]
9/16/02	RECORDS received: Transcript, consisting of 4 Vols. (3 vols. Trial, 1 Vol. Prelim. Injunction Hrg. Location St. Paul, MN. [02-2769, 02-2832] (jab) [02-2769 02-2832]
	* * * * *
10/8/02	BRIEF FILED - Brief of Appellees - Livestock Marketing Association, et al. in 02-2769/2832 13946 words w/addendum - 10 copies - w/service 10/7/02. w/diskette [02-2769, 02-2832] [1569205] (lmt) [02-2769 02-2832]
	* * * * *

DATE	PROCEEDINGS
10/25/02	BRIEF FILED - Reply brief - USDA, Ann Veneman, and Cattlemen's Beef in 02-2769. 6,070 words 10 copies - w/service 10/24/02 w/diskette. [02-2769] [1574999] (vla) [02-2769]
	* * * * *
3/10/03	ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES Theodore McMillian, Circuit Judge, George G. Fagg, Senior Judge, James B. Loken, Circuit Judge. Douglas Letter for Appellants Cattlemen's Beef, Appellants Ann Veneman, Appellants USDA in 02-2769, John G. Roberts for Appellants Ralph Jones, Appellants Gary Sharp, Appellants NE Cattlemen in 02-2832. Philip C. Olsson for Appellees Jerry Goebel, Appellees Herman Schumacher, Appellees Pat Goggins, Appellees John Willis, Appellees Ernie J. Mertz, Appellees John L. Smith, Appellees Robert Thullner, Appellees Western Organization, Appellees Livestock Marketing in 02-2769. Rebuttal by: Douglas Letter. RECORDED. [02-2769, 02-2832] (cyz) [02-2769 02-2832]

DATE	PROCEEDINGS
7/8/03	THE COURT: James B. Loken, Theodore McMillian, George G. Fagg. OPINION FILED by Theodore McMillian, Authoring Judge PUBLISHED. [02-2769, 02-2832] [1662889] (dms) [02-2769 02-2832]
7/8/03	JUDGMENT: James B. Loken, Theodore McMillian, George G. Fagg. The judgment of the lower court is AFFIRMED in accordance with the opinion. [02-2769, 02-2832] [1662893] (dms) [02-2769 02-2832]
8/22/03	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellants USDA in 02-2769, USDA in 02-2832, w/ service 8/21/03., TO COURT. [02-2769, 02-2832] (dms) [02-2769 02-2832]
8/22/03	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellants Cattlemen's Beef in 02-2769, Appellants Gary Sharp in 02-2832, Appellants Ralph Jones in 02-2832 , w/service 8/21/03., TO COURT. [02-2769, 02-2832] (dms) [02-2769 02-2832]
	* * * * *
9/12/03	RESPONSE to petition for Rehearing with petition for rehearing en banc filed by USDA,

DATE	PROCEEDINGS
	USDA [1679304-1] [1686917] in 02-2769, petition for Rehearing with petition for rehearing en banc filed by Cattlemen's Beef, Gary Sharp, Ralph Jones [1679307-1] [1686917] in 02-2769, petition for Rehearing with petition for rehearing en banc filed by USDA, USDA [1679304-1] [1686917] in 02-2832, petition for Rehearing with petition for rehearing en banc filed by Cattlemen's Beef, Gary Sharp, Ralph Jones [1679307-1] [1686917] in 02-2832. Response filed by Livestock Marketing in 02-2769, Western Organization in 02-2769, Robert M. Thullner in 02-2769, John L. Smith in 02-2769, Ernie J. Mertz in 02-2769, John Willis in 02-2769, Pat Goggins in 02-2769, Herman Schumacher in 02-2769, Jerry Goebel in 02-2769, Leo Zentner in 02-2769, Livestock Marketing in 02-2832, Western Organization in 02-2832, Robert M. Thullner in 02-2832, John L. Smith in 02-2832, Ernie J. Mertz in 02-2832, John Willis in 02-2832, Pat Goggins in 02-2832, Herman Schumacher in 02-2832, Jerry Goebel in 02-2832, Leo Zentner in 02-2832. w/service 9/11/03 TO COURT. [02-2769, 02-2832] (dms) [02-2769 02-2832]
	* * * * *

DATE	PROCEEDINGS
10/16/03	JUDGE ORDER: The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Murphy and Judge Melloy would grant the petition for rehearing en banc. Judge Wollman did not participate in the consideration or decision of this matter. - Published Order [1679304-1] [02-2769, 02-2832] [1697444] [1679307-1] [02-2769, 02-2832] [1697444] (dms) [02-2769 02-2832]
10/17/03	MOTION of aplnt, USDA in 02-2769, Ann Veneman in 02-2769, Cattlemen's Beef in 02-2769, NE Cattlemen in 02-2832, Gary Sharp in 02-2832, Ralph Jones in 02-2832, to stay mandate. [02-2769, 02-2832] [1697777], TO COURT. w/service 10/17/03 (dms) [02-2769 02-2832]
	* * * * *
10/29/03	JUDGE ORDER: granting appellant motion to stay mandate [1697777-1] [02-2769, 02-2832] [1702013] in 02-2769, 02-2832 (paw) [02-2769 02-2832]
	* * * * *

DATE	PROCEEDINGS
1/14/04	MOTION of aplnt, USDA in 02-2769, Ann Veneman in 02-2769, Cattlemen's Beef in 02-2769, USDA in 02-2832, Ann Veneman in 02-2832, Cattlemen's Beef in 02-2832, NE Cattlemen in 02-2832, Gary Sharp in 02-2832, Ralph Jones in 02-2832, to stay mandate. [02-2769, 02-2832] [1726630], TO COURT. w/ service 1/13/04 (dms) [02-2769 02-2832]
	* * * * *
3/19/04	JUDGE ORDER: Granting appellant's motion for an extension of the stay of mandate until final disposition in the Supreme Court. [1726630-1] [02-2769, 02-2832] [1748396] in 02-2769, 02-2832 (dms) [02-2769 02-2832]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/29/00	5	DECLARATION of Nancy Robinson (sn)
12/29/00	6	AFFIDAVIT of Ronald A. Parsons, Jr. (attachment not scanned) (sn)
		* * * * *
01/04/01	7	DECLARATION of Robert M. Thullner (sn)

DATE	DOCKET NUMBER	PROCEEDINGS
01/05/01	8	DECLARATION of John L. Smith (jb)
		* * * * *
02/23/01	37	MEMORANDUM OPINION AND ORDER by Charles B. Kornmann granting motion for preliminary injunction [16-1], granting motion for Preliminary Injunction [3-1] (cc: all counsel) (jb)
		* * * * *
08/03/01	79	THIRD AMENDED COMPLAINT For Declaratory and Injunctive Relief by plaintiff Ernie J. Mertz, plaintiff John L. Smith, plaintiff Robert M. Thullner, plaintiff Western Organization, plaintiff Livestock Marketing; adding John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, Leo Zentner (jb)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
09/21/01	82	ANSWER TO THIRD AMENDED COMPLAINT by intervenor defendant Nebraska Cattlemen, intervenor defendant Gary Sharp, intervenor defendant Ralph Jones to [79-1] (dc)
		* * * * *
10/19/01	104	JOINT STATEMENT of Stipulated Facts by defendant Cattlemen's Beef, defendant US Dept of Agric, defendant Ann Veneman (attachments not scanned) (in expando) (dc)
		* * * * *
10/22/01	108	FOURTH AFFIDAVIT of Counsel With Attached Plaintiffs' Exhibits Nos. 47-61 (Exhibits not scanned) (in expando) (jb)
10/22/01	109	AFFIDAVIT of Daniel A. Sumner (jb)

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/01	110	DECLARATION of Robert M. Thullner (jb)
10/22/01	111	DECLARATION of John L. Smith (jb)
10/22/01	112	DECLARATION of Ernie J. Mertz (jb)
10/22/01	113	DECLARATION of John Willis (jb)
10/22/01	114	DECLARATION of Pat Goggins (jb)
10/22/01	115	DECLARATION of Herman Schumacher (jb)
10/22/01	116	DECLARATION of Jerry Goebel (jb)
10/22/01	117	DECLARATION of Leo Zentner (jb)
10/22/01	118	DECLARATION of Pat Goggins on behalf of the Livestock Marketing Association (jb)
10/22/01	119	DECLARATION of John D. Smillie on behalf of the Western Organization of Resource Councils (jb) (Entered: 10/22/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/28/01	153	PRE-TRIAL WITNESS AND EXHIBIT DESIGNATION submitted by plaintiff Ernie J. Mertz, plaintiff John L. Smith, plaintiff Robert M. Thullner, plaintiff Western Organization, plaintiff Livestock Marketing (sn)
		* * * * *
01/15/02	165	EXHIBIT LIST by plaintiffs (kh) [Entry date - 01/16/02]
01/15/02	166	EXHIBIT LIST by defendants (kh) [Entry date - 01/16/02]
01/15/02	167	EXHIBIT LIST by intervenor defendants (kh) [Entry date - 1/16/02]
		* * * * *
01/24/02	169	THIRD SUPPLEMENTAL DECLARATION of Barry Carpenter (attachments not scanned) (dc)

DATE	DOCKET NUMBER	PROCEEDINGS
01/24/02	170	DECLARATION of Thomas Ramey (attachments not scanned) (dc)
01/31/02	171	TRANSCRIPT of Court Trial held on 1/14/02 Volumes I, II & III (in expando) (jb)
		* * * * *
06/21/02	174	MEMORANDUM OPINION AND ORDER re: plaintiff's request in the seventh cause of action of their third amended complaint for declaratory and injunctive relief is granted; The Beef Promotion and Research Act and the Beef Order promulgated thereunder, which mandate the payment of an assessment by cattle producers, importers, and others who sell beef subject to the terms of the Act, are unconsitutional and unenforceable; the defendants are hereby enjoined and restrained from any further collection of beef checkoffs as of the start of

DATE	DOCKET NUMBER	PROCEEDINGS
		business on July 15, 2002; attorney fees, sales tax and costs shall be awarded to plaintiffs; the defendants are permanently enjoined and restrained from any further use of checkoff funds by Judge Charles B. Kornmann (cc: all counsel) (jb) [Entry date 06/24/02] [Edit date 06/24/02]
06/21/02	175	JUDGMENT in favor of Ernie J. Mertz, John L. Smith, Robert M. Thullner, Western Organization, Livestock Marketing, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, Leo Zentner and against Cattlemen's Beef, US Dept of Agric, Ann Veneman by Judge Charles B. Kornmann ; (cc: all counsel) (jb)
07/03/02	176	NOTICE OF APPEAL by defendant Cattlemen's Beef, defendant US Dept of Agric, defendant Ann Veneman from [174-1] , Appeal fee wv (cc: all counsel, Court Reporter) (jb)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
07/15/02	182	NOTICE OF APPEAL by intervenor defendant Nebraska Cattlemen, intervenor defendant Gary Sharp, intervenor defendant Ralph Jones from Judgment [175-1] , Appeal fee pd (cc: all counsel, Court Reporter) (sn) (Entered: 07/15/2002)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL., INTERVENOR-DEFENDANTS

PLAINTIFFS' THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE CASE

1. This is an action for declaratory and injunctive relief arising from the failure of the U.S. Department of Agriculture ("USDA") and the Secretary of Agriculture ("the Secretary") to provide diligent oversight and implementation of the referendum provisions of the Beef Research and Promotion Act. 7 U.S.C. § 2906. Plaintiff Livestock Marketing Association ("LMA") submitted to USDA petitions signed by the individual plaintiffs in this action and by more than 140,000 other cattlemen seeking a referendum on the Beef Promotion and Research Order. The failure of USDA and the Secretary to act upon the petitions violates statutory

and constitutional requirements. In addition, this action challenges the constitutionality of the Beef Research and Promotion Act of 1985, 7 U.S.C. §§ 2901-11 in light of the Supreme Court's recent decision in *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001).

JURISDICTION AND VENUE

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1361, 2201, and 2202, and by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

3. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e).

THE PARTIES

4. Plaintiff Robert M. Thullner, 10589 US Hwy 83, Herried, South Dakota 57632, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

5. Plaintiff John L. Smith, Box 336, Fort Pierre, South Dakota 57532, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order and resides in this judicial district.

6. Plaintiff Ernie J. Mertz, 32028 132 Street, Bowdle, South Dakota 57428, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

7. Plaintiff John Willis, P.O. Box 354, Lake City, Florida, 32056-0354, is an individual who has a small cow-calf operation and pays the mandatory assessments

imposed by the Beef Research and Production Act. He is the Chairman of the Board of the Livestock Marketing Association and the owner of the Columbia Livestock Market of Lake City, Inc. in Lake City, Florida.

8. Plaintiff Pat Goggins, P.O. Box 1781, Billings, Montana, 59103, is an Angus breeder, cow/calf operator, and cattle feeder. He estimates that he pays approximately $30,000 annually in beef checkoff assessments. He is the President of the Livestock Marketing Association and owner of Public Auction Yards in Billings, Montana.

9. Plaintiff Herman Schumacher, P.O. Box 67, Herreid, South Dakota 57632-0067, owns a feedyard in South Dakota and pays the mandatory beef checkoff assessments. He also owns Herried Livestock Market, Inc. in Herreid, South Dakota.

10. Plaintiff Jerry Goebel, RRI, Box 46A, Lebanon, SD, is a cattle producer as defined by the Act. He is a resident of South Dakota. Mr. Goebel did not receive the PwC mail survey, but did receive a telephone call from a PwC representative on or about January 11 or 12, 2001. He responded to their request for financial information on January 23, 2001.

11. Plaintiff Leo Zentner, 9602 Alexander Road, Shepherd, Montana, 59079, is a cattle producer as defined by the Act. He is a resident of Montana. Mr. Zentner received a telephone call from PwC on January 4th or 5th, 2001. He then received a PwC mail survey on approximately January 12, 2001. He sent the requested financial information on January 16, 2001.

12. Plaintiff Livestock Marketing Association, 7509 Tiffany Springs Parkway, Kansas City, MO 64153-2315,

is a trade association representing livestock marketing businesses, which was established in 1947 as the National Livestock Auction Association. It is incorporated as a not-for-profit organization in the State of Missouri, and its members are persons engaged in operating livestock markets, who regularly engage in the purchase of cattle. The Livestock Marketing Association currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers. Approximately 90 percent of LMA members are market operator and dealers who also have cattle production operations and therefore are subject to and pay as well as collect the mandatory beef checkoff assessments.

13. Plaintiff Western Organization of Resource Councils ("WORC"), 2401 Montana Avenue, #301; Billings, Montana 59101, is an association of grassroots organizations which, in turn, are composed of affiliated citizens' groups based in 42 communities throughout the region. Members of WORC include the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), the Powder River Basin Resource Council (Wyoming) and the Western Colorado Congress (Colorado). The members of these groups are farmers, ranchers, small business and working people who seek to protect natural resources, family farms, and rural communities, including cattle producers who are subject to and pay the mandatory beef checkoff assessments.

14. The United States Department of Agriculture, Defendant, is an agency of the United States government.

15. Defendant Ann Veneman is the Secretary of Agriculture (the Secretary), and is sued in her official capacity. The Secretary is charged with administering the Beef Promotion and Research (the "Act" or the "Beef Promotion Act"), 7 U.S.C. §§ 2901-11, which establishes beef promotion program, funded through per-head assessments on Cattle producers and which gives cattle producers who are subject to the Act the right to request that the Secretary hold a referendum in order to determine where the program should be continued.

16. Defendant Cattlemen's Beef Promotion and Research Board (herein, and popularly, referred to as the "Cattlemen's Beef Board") is an organization authorized pursuant to the Beef Promotion and Research Act, 7 U.S.C. § 2904(1), and created pursuant to the Beef Promotion and Research Order. It is composed of cattle producers and importers, who are appointed by the Secretary and charged with administering the Beef Promotion and Research Order at the federal level.

BACKGROUND

Statutory and Regulatory Scheme

17. The Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11, originally enacted in 1976, is intended to strengthen the beef industry's position in the marketplace through a coordinated program of promotion and research. 7 U.S.C. §§ 2901(b).

18. The Beef Promotion and Research Program is funded by mandatory producer contributions. Currently, there are a number of other producer funded promotion and research programs for agricultural

commodities, identical in many of their functional respects to the Beef Promotion Act.

19. The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research order to be financed through one dollar per head assessments and which must be paid by all cattle producers and importers. 7 U.S.C. § 2904(8)(C). Each person receiving a payment from a producer is designated a "collecting person" 7 C.F.R. § 1260.311(a), and is required to remit the assessments either to a qualified State beef council or directly to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.172(a)(5), 1260.311(a), 1260.312(c).

20. The Beef Promotion and Research Act provides for the formation of a Cattlemen's Beef Board (CBB), which is a large committee of competitors of the individual plaintiffs. Members of the CBB are nominated by state cattle associations. The CBB has 110 members, consisting jointly of both domestic cattle producers and importers of foreign beef and cattle.

21. The CBB is a non-governmental entity which purports and holds itself out to be an entity representative of one segment of the population with certain common interests, namely cattle producers.

22. Members of the CBB and the Operating Committee are not government officials, but rather, individuals from the private sector.

23. The pool of nominees from which CBB members are selected are determined by private beef industry organizations from various states.

24. The private beef industry organizations eligible to participate in CBB nominations are those that "have a history of stability and permanency," and whose "pri-

mary or overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4).

25. Plans and projects "of promotion and advertising, research, consumer information, and industry information . . . paid for with assessments collected by the Board" are developed by the Beef Promotion Operating Committee (BPOC), composed of 10 members elected by the CBB from its own membership and "10 producers elected by a federation that includes as members the qualified State beef councils." That "federation" is the Checkoff Division of NCBA. 7 U.S.C. 2904(4)(A).

26. The Cattlemen's Beef Board and the Beef Promotion Operating Committee, including all of their activities pursuant to the Beef Promotion and Research Act and all of their staff, are funded entirely by mandatory assessments and involve no appropriated government funds.

27. The National Cattlemen's Beef Association (NCBA), a private trade association, enjoys a virtual monopoly of the CBB's contracts "for implementing and carrying out the activities authorized by the [Act.] . . . including . . . programs of promotion, research, consumer information and industry information." 7 U.S.C. § 2904(6). The CBB and NCBA operate in close conjunction with one another, are housed in the same building, and host virtually seamless interlocking Internet websites.

28. Funds for the promotion and advertising programs developed by the CBB, BOC, and NCBA are generated by levying a mandatory, one dollar per head

assessment on every sale of cattle in the United States. 7 U.S.C. § 2904(8)(C).

29. Under the terms of the Act, the first twenty-two months after an Order is, in effect, a "trial period." Within that 22-month period, the Secretary is required to conduct a referendum among persons who were producers and importers during the trial period to determine whether the persons subject to the Order felt that it should continue in effect. 7 U.S.C. § 2906(a).

30. The Secretary issued an Order on July 18, 1986, 51 Fed. Reg. 26132; the required referendum was conducted on May 10, 1988; the Order was approved and assessments subsequently became mandatory.

31. The only way that the Order may now by suspended or terminated is by a new referendum "on the request of a representative group comprising ten per centum or more" of the cattle producers subject to the order. 7 U.S.C. § 2906(b).

32. Amendments to the Act in 1985 deleted the Secretary's previously existing unilateral powers either to terminate the Order or to call a referendum on his or her own initiative.

33. Amendments to the Act in 1985 deleted and repealed the separability provision, which had provided that if any provision or application of the Act to any person or circumstance where held invalid, the validity of the remainder of the Act would not be affected thereby.

34. The Beef Promotion and Research Act deals only with the advertising, promotion, and research of beef. The Act does not regulate the beef industry, nor does it purport to regulate the beef industry. The Act does not regulate price, size, pack, maturity, production levels,

quotas, reserves, or any other matters designed to restrict competition and/or stabilize markets or prices. Rather, the Beef Promotion and Research Act exists only for the purpose of compelling producers who sell cattle to fund the advertising and promotional activities of the CBB of generic beef.

35. The cattle production industry is a free market industry governed by supply and demand.

36. Most monies raised by the assessments under the Beef Promotion and Research Act are spent for generic advertising and generic promotion.

Factual Background

37. Cattle are produced throughout the United States. USDA has estimated that approximately 1.07 million of the 1.9 million Americans engaged in the agricultural industry produce cattle. The cattle industry is the single largest sector of the agricultural industry, generating approximately $30 billion annually for the United States economy.

38. United States beef cattle are generally raised and grazed on ranches and finished to market weight on mixed grain rations in feedlots.

39. Cattle which have been fed mixed rations and feed grains represent the largest sector of cattle production and slaughter in the United States. Ranchers raising grain-fed cattle typically sell their feeder calves to feedlots and their mature cows and bulls to slaughter plants through auction markets and by private treaty sales. Grain-fed cattle are typically slaughtered and their meat sold as fresh subprimals, such as rounds, chucks, and loins to retailers, where it is sold to consumers as roasts and steaks very often with grades of USDA prime, USDA choice, and USDA select.

40. Cattle for slaughter are also produced as a "byproduct" by dairy farmers. Dairy producers will typically "cull" their herds of these cattle, both to reduce production when milk prices are low and to remove older cows from milk production. In addition, many of the offspring of milk cows are sold. These "cull cows" are typically marketed through auction marketed through auction markets to cow slaughter plants. Beef from on-grain-fed cattle, such as cattle produced as byproducts of dairy production, is generally less tender, and therefore better suited for making ground beef and further processed beef products.

41. A significant amount of beef sold in the United States is imported, rather than originating from fed cattle raised, sold, and processed in the United States. Much of this imported beef comes from cattle which are grass-fed and not grain-fed, and comes from herds and breeds which produce a substantially lesser quality of beef than United States cattle.

42. The individual plaintiffs, the large majority of members of LMA, and the large majority of members of the member organizations of WORC are United States ranchers and cattle producers, primarily with cow-calf operations, who raise calves to a weight where they are sold through auction markets to either stockers or feeders. They produce United States, grain-fed cattle, to be sold as United States beef.

43. The individual plaintiffs, the large majority of members of LMA, and the large majority of members of the member organizations of WORC are cattle producers who are subject to the mandatory assessments of the Beef Promotion and Research Act and who have paid the mandatory one-dollar per head beef checkoff assessment for all of the cattle that they have sold since

the inception of the Act. The members of the LMA also collect these assessments at their livestock auctions, at which cattle producers sell their cattle.

44. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion and Research Act, more than $1 billion has been expended from assessments on cattle producers, but beef demand has decreased overall.

45. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion and Research Act, the gap between cattle prices received by cattle producers and retail beef prices has widened at an accelerated rate. The cattle producer's share of the beef retail dollar has fallen from approximately 70 percent in the 1970s to below 50 percent in 1996.

46. Beef packers, beef processors, beef marketers, beef wholesalers, and beef retailers are not subject to the mandatory assessments of the Beef Promotion and Research Act, even though they are in the best position to directly profit or gain advantage from any alleged benefits of the promotion advertising, and other activities funded by the mandatory assessments on cattle products.

47. Most, if not all, of the promotional programs supported by the mandatory beef checkoff assessments are "generic," in the sense that they do not recognize the distinguishing characteristics and qualitative differences between United States and imported beef, or grain-fed and non-grain-fed beef.

48. The generic promotion and advertising programs of the Beef Promotion and Research Order have had no discernable effect on the consumption of beef in the United States.

49. During 1997 and 1998, livestock markets found themselves deducting assessments from prices which were already not sufficient to cover producer costs. Producers expressed extraordinary frustration regarding these assessments at livestock markets.

50. As a service to their customer-cattlemen, LMA and its members decided to initiate a petition drive to obtain a referendum on continuation of the program. LMA undertook this action to provide producers throughout the United States with an opportunity to have input into the decision as to whether the program should be continued, terminated or revised.

51. Beginning in 1997, LMA members directed the association to explore the appropriate procedures for submitting petitions seeking a referendum. In 1997 and early 1998 LMA made inquiries to the Secretary concerning the petition process for a beef referendum. In March, 1998, USDA provided LMA with a list of current requirements and sample language for the petition, which LMA adopted in its entirety. USDA further stated that the petition must contain a signature, the date of each signature, the printed name of the signer, the signer's company name (if applicable), the signer's full address, and the signer's telephone number.

52. In April 1998, USDA further advised LMA that initiation of a referendum would require: (1) the verification of 116,791 valid signatures; (2) the determination that the persons who signed the petition are "a representative group of cattle producers," and (3) a decision by the Secretary to conduct the requested referendum.

53. LMA began collecting petition signatures in July, 1998. LMA and its members were supported in

this effort by other organizations including the National Farmers Union and the Western Organization of Resource Councils. The petition drive lasted until September 31, 1999, and LMA collected, in total, 145,045 signatures, all of which were submitted to the Secretary on November 12, 1999. Because USDA specified that the necessary number of signatures would have to be collected within a single continuous 12-month period, LMA designated 125,788 signatures collected in the period between September 1, 1998 and August 31, 1999 as being from the qualifying twelve-month period.

54. By the time LMA submitted the petitions, the total number of cattlemen in the country had declined by approximately eight percent so that ultimately only 197,883 signatures were required, to meet the qualifying 10 percent requirement.

55. Support for the referendum was particularly strong in South Dakota. Of the 18,700 beef and dairy producers in the state, 8,545, or more than 45 percent, signed petitions seeking a referendum.

56. Beginning in mid-1998, the Cattlemen's Beef Board and its principal contractor, the National Cattlemen's Beef Association, initiated a vastly expanded program of "producer communications." These communications were clearly designed to persuade producers against signing petitions and to promote a "no" vote on any referendum.

57. Both LMA and WORC wrote to USDA in April, 1999, protesting "producer communications" expenditures, which had increased from $850,000 in Fiscal Year 1996 and $653,591 in Fiscal Year 1997 to $3,748,604 in Fiscal Year 1998, $1,135,000 in Fiscal Year 1999 and

$3,295,073 in Fiscal Year 2000. Including the budget of $1,870,000 for FY 2001, which is just beginning, the Cattlemen's Beef Board has thus allocated a total of $10,048,677 for producer communications since 1998.

58. These "producer communications" funds have been directed to promoting the program back to the producers who pay the mandatory $1 per head checkoff.

59. The petitions submitted by LMA were already in a Microsoft database format when they were provided to USDA on November 12, 1999. USDA did not proceed to review the database until April, 2000, and it was not completed until September, 2000. Thus, almost ten months elapsed before the agency completed even its first step in verifying signatures and producer status.

60. Although cattle producers have been making mandatory check-off contributions since 1986, USDA apparently does not have any way of identifying the cattlemen who have contributed to the program. USDA contracted with a private accounting firm, PricewaterhouseCoopers, to contact a statistical sample of beef petition signers by mail to confirm individual signatures and obtain sales documents, with a contract completion date of mid-January, 2001. PricewaterhouseCoopers sent survey forms to referendum petitioners, asking for this information. The forms sent did not bear a control number assigned by the Office of Management and Budget.

61. In 1997 and 1998, when LMA representatives met and exchanged correspondence with USDA officials about the information that would be provided by each petitioner, they were never told, then or later, that individual petitioners would need to provide personal sales documents at all, nor that these sales

documents would have to be from exactly the same time period as that set for signing petitions.

62. On February 5, 2001, PricewaterhouseCoopers issued a report concluding that there were not sufficient valid signatures to trigger a referendum, upon which the USDA has relied in denying a referendum.

63. The Plaintiffs have suffered past injury and harm, and face the threat of ongoing and future injury and harm as the result of the actions of the Defendants.

Legal and Procedural Background

64. Plaintiffs initially filed their complaint seeking declaratory and injunctive relief.

65. Plaintiffs previously sought and obtained a preliminary injunction against certain producer communications funded by mandatory assessments under the Beef Promotion and Research Order.

66. The United States Supreme Court subsequently released its decision in *United States v. United Foods, Inc.*, 121 S. Ct. 2334 (2001) which held that the assessments under the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.* violated the First Amendment to the United States Constitution.

67. At the oral argument before the United States Supreme Court, the Assistant to the Solicitor General, Barbara McDowell, Esq., asserted that the beef program "is very much like the mushroom program."

68. The Court then invited the parties to address the impact of the *United Foods* decision on the present case.

69. The parties responded to the Court in a joint statement informing the Court that "The parties are in agreement that the issue regarding the constitutionality of the beef checkoff program called into question by the Supreme Court's recent decision in *United Foods* needs to be resolved prior to proceeding with Plaintiffs' claims related to the LMA's petition drive and the validation process conducted by USDA and PwC."

70. The Plaintiffs were then granted permission to file this amended complaint.

71. The present case is governed by the *United Foods* decision.

72. The mandated assessments under the Beef Promotion and Research Act are not ancillary to a more comprehensive program restricting marketing autonomy. To the contrary, the advertising and promotion of beef, far from being ancillary, is the principal object of the regulatory scheme.

73. Unlike California tree fruits, the beef industry is identical to the mushroom industry in that beef is not marketed under detailed marketing orders that have displaced competition to such an extent that they had an antitrust exemption.

74. The beef industry is characterized by a free market and the aggregate consequences of independent competitive choices of cattle producers, and is not characterized by collective action in any sense.

75. Cattle producers are not bound together and required by statute to market their products according to cooperative rules. Their freedom to market independently is not constrained by any regulatory scheme

and they are not part of any broader collective enterprise.

76. Almost all of the funds collected under the Beef Promotion and Research Order are used for generic advertising and promotion.

77. Beyond the collection and disbursement of advertising and promotion funds, there are no marketing orders regulating beef production and sales, no exemption from antitrust laws, and nothing preventing individual producers from making their own marketing decisions.

78. Cattle producers are not forced to associate as a group that makes cooperative marketing decisions.

79. Cattle production is unregulated, except for the enforcement of mandatory assessments used for beef promotion and research.

80. The cattle production industry has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.

81. The Beef Promotion and Research Act does not require group marketing action among cattle producers, save to generate the very speech to which the plaintiffs object through advertising and promotion funded by the mandatory assessments.

FIRST CAUSE OF ACTION

82. The Plaintiffs reiterate and incorporate by reference paragraphs 1-81 hereof.

83. The USDA Defendants' delays in handling Plaintiffs' petitions constitute unreasonable delay, in vio-

lation of sections 555 and 706(2) of the Administrative Procedure Act.

SECOND CAUSE OF ACTION

84. The plaintiffs reiterate and incorporate by reference paragraphs 1-83 hereof.

85. The Secretary's "validation" program is seriously flawed and denied Plaintiffs their rights to due process and equal protection of the law.

THIRD CAUSE OF ACTION

86. The plaintiffs reiterate and incorporate by reference paragraphs 1-85 hereof.

87. The Cattlemen's Beef Board's producer communications activities violate both the Beef Promotion and Research Act and the First Amendment by using checkoff funds for "producer communications" to disseminate public relations and political messages, including anti-referendum messages supporting the beef checkoff.

FOURTH CAUSE OF ACTION

88. The plaintiffs reiterate and incorporate reference paragraphs 1-87 hereof.

89. The deletion of extensive portions of the Beef Promotion and Research Act, when it was amended in 1985, eliminated the Secretary's ability to terminate the Order on his own initiative or to call a referendum on his own initiative, and eliminated the presumption that the Secretary would call a referendum in response to a petition from ten percent of the producers. The result of these changes was to cause an unconstitutional delegation of legislative authority to the Cattlemen's Beef Board.

FIFTH CAUSE OF ACTION

90. The plaintiffs reiterate and incorporate by reference paragraphs 1-89 hereof.

91. The termination and referendum provisions of the Beef Promotion Act provide far less protection against the continuation of an abusive and/or ineffective program than are provided with respect to similar promotional programs, and therefore violate the rights of cattle producers to equal protection under the Fifth Amendment to the United States Constitution.

SIXTH CAUSE OF ACTION

92. The plaintiffs reiterate and incorporate by reference paragraphs 1-91 hereof.

93. In implementing the validation program the Secretary has failed to comply with the requirements of the Paperwork Reduction Act of 1995.

SEVENTH CAUSE OF ACTION

94. The plaintiffs reiterate and incorporate by reference paragraphs 1-93 thereof.

95. Under the First Amendment to the United States Constitution, the CBB may not underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the ideas being advanced.

96. The plaintiffs oppose the general content of the promotion, advertising, and other activities funded by the mandatory assessments which they are compelled to pay.

97. Plaintiffs want to convey the message that United States cattle and beef are superior to imported beef and object to being charged for a contrary

message, one which promotes beef as a generic commodity.

98. Plaintiffs object to the use of mandatory assessments against them for the generic promotion and advertising of beef, as opposed to United States beef in particular, which they believe to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality. Plaintiffs object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle. Plaintiffs object to the association of beef from United States fed cattle with beef from imported cattle.

99. Importers of foreign beef are subject to the equivalent of a one dollar per head mandatory assessments under the Beef Promotion and Research Act and co-fund the beef checkoff and its advertising and promotion efforts along with United States fed cattle producers.

100. Plaintiffs believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase, if anything, the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers. Plaintiffs object to the messages conveyed and object to financing advertising for the benefit of their competitors.

101. Plaintiffs object to the use of mandatory assessments against them for the generic promotion and advertising of beef, as opposed to fed beef or grain-fed

beef, which they believe to be superior. This is also a message that they wise to convey. They object to being charged for a contrary message.

102. Plaintiffs object to the use of mandatory assessments against them for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. The object to being charged for a message which they do not support. They object to being compelled to pay assessments for speech with which they disagree, and which does not benefit them, but instead benefits those who are not subject to the assessments.

103. Certain of the plaintiffs object to the use of mandatory assessments against them for the promotion and advertising of generic beef, as opposed to specific breeds or brands of beef, such as certified Angus or Hereford, which they believe to be superior types of beef. They object to being charged for a contrary message.

104. Plaintiffs object to the advertising and promotional activities funded by the mandatory assessments against them because they are ineffectual. They object to being charged for a message which they do not support.

105. Plaintiffs object to the advertising and promotional activities funded by the mandatory assessments against them because the beef packers, beef processors, and beef retailers who are in the best position to recoup any alleged benefits of those activities are "free riders" who do not share in the cost. They object to being charged for a message which they do not support.

106. Plaintiffs object to various other specific messages that appear in advertisements promotional messages and other programs funded by the mandatory assessments against them, including but not limited to, those messages against which a preliminary injunction has been entered by this Court. They object to being charged for messages with which they disagree or do not support.

107. The Beef Promotion and Research Act does not serve a legitimate government interest.

108. Plaintiffs object to being compelled to express certain views and to being compelled to pay subsidies for speech to which they object. Yet they are forced to do so by law under the Beef Research and Promotion Act. This is an obligation imposed by law making membership in the group forced to pay assessments and fund objectionable speech less than voluntary.

109. Essentially the only program or purpose that these mandatory assessments serve is the advertising and promotion scheme to which the plaintiffs object.

110. The expressions the plaintiffs are required to support are not germane to any purpose independent of the compelled speech itself.

111. The assessments are not necessary to make any voluntary advertisements non-misleading for consumers.

112. The Beef Promotion and Research Act violates Plaintiffs' right to freedom of speech under the First Amendment to the United States Constitution in that the Beef Promotion and Research Order wrongfully compels Plaintiffs to fund the speech of the Cattlemen's Beef Board. This speech is objectionable to Plaintiffs. This speech is contrary to the interests of Plaintiffs.

This speech neither serves nor is ancillary to any legitimate economic or governmental purpose.

EIGHTH CAUSE OF ACTION

113. The plaintiff reiterate and incorporate by reference paragraphs 1-112 thereof.

114. The Plaintiffs object to association with the National Cattlemen's Beef Association, a private trade organization which is the principal contractor for the CBB and which controls, administers, and oversees most if not all of the beef research projects funded by the mandatory assessments collected under the Beef Promotion and Research Order.

115. The National Cattleman's Beef Association is a private trade association with only 40,000 individual members. The Plaintiffs object to many of the policies, positions, and programs advocated by this private trade association, including those designed to promote the generic consumption of beef as opposed to specifically beef from United States fed cattle. The Plaintiffs object to being compelled to fund that organization and the research projects selected by that organization. The Plaintiffs object to being compelled to associate with that organization through the research funded by the mandatory assessments collected under the Beef Promotion and Research Order.

116. The Beef Promotion and Research Act violates Plaintiffs' right to freedom of association under the First Amendment to the United States Constitution in that the Beef Promotion and Research Order wrongfully compels Plaintiffs to associate with the National Cattlemen's Beef Association, the Cattleman's Beef Board, and entities which import beef which is not United States fed cattle beef.

PRAYER FOR RELIEF

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant a Declaratory Judgment declaring (a) that the Beef Promotion and Research Act and Beef Promotion and Research Order violate the plaintiffs' constitutionally guaranteed rights to freedom of speech and freedom of association under the First Amendment to the United States Constitution and plaintiffs' constitutionally guaranteed right to equal protection under the Fifth Amendment to the United States Constitution; and (b) that the Secretary cannot constitutionally collect assessments pursuant to that Act, and further request that the Court grant Plaintiffs a preliminary and permanent injunction prohibiting the United States Department of Agriculture or the Cattlemen's Beef Board from enforcing or collecting any assessments under Beef Promotion and Research Act or Beef Promotion and Research Order.

In the alternative, the Plaintiffs respectfully request that the Court enter a Preliminary and Permanent Injunction, ordering (a) the USDA Defendants to immediately proceed to scheduling a referendum on the termination of the Beef Research and Promotion Order, and (b) the Cattlemen's Beef Board to immediately cease its expenditures for "producer communications" and to advise the Court how it will make restitution to producers for the $10,048,677 illegally expended on such communications since 1998, and how it will provide to the Plaintiffs funding for corrective communications to offset the anti-referendum messages previously funded by the illegal producer communications expenditures.

Plaintiffs further pray for an award of attorney's fees and costs under the Equal Access to Justice Act, and

for such other legal and equitable relief as the evidence may support or the Court may deem just and proper.

Dated: August 1st, 2001 Respectfully submitted,

JOHNSON, HEIDEPRIEM, MINER, MARLOW & JANKLOW, L.L.P.

BY RA PARSONS
Scott N. Heidepriem
Ronald A. Parson, Jr.
431 N. Phillips Ave. - Suite 400
Sioux Falls, SD 57104-5983
(605) 338-4304

OLSSON, FRANK AND WEEDA, P.C.
Philip C. Olsson
Ryan W. Stroschein
1400 Sixteenth Street, N.W. - Suite 400
Washington, D.C. 20036-2220
(202) 789-1212

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civ. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS

WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES

AND

ROBERT M. THULLNER, JOHN L. SMITH, ERNIE J. MERTZ, JOHN WILLIS, PAT GOGGINS, HERMAN SCHUMACHER, JERRY GOEBEL AND LEO ZENTNER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANN VENEMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

INTERVENORS' ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT

Comes now the Defendants, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones [hereinafter "these Defendants"], and for their Answer to Plaintiffs' third Amended Complaint, state and allege as follows:

1.

That the Plaintiffs' Third Amended Complaint fails to state a claim upon which relief could be granted.

2.

That these Defendants deny each and every allegation, matter and thing contained in the Plaintiffs' Third Amended Complaint, other than those hereinafter admitted.

3.

That these Defendants admit Paragraphs 2, 3, 14, 30, 64, 65, 68, and 70 of the Plaintiffs' Third Amended Complaint.

4.

That these Defendants are without sufficient knowledge or information to admit or deny Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 33, 37, 39, 40, 46, 52, 57, 62, 67, 80, and 115 of the Plaintiffs' Third Amended Complaint.

5.

That these Defendants specifically deny Paragraphs 1, 13, 16, 17, 21, 26, 27, 28, 34, 35, 36, 38, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 53, 54, 55, 56, 58, 59, 60, 61, 63, 66, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, and 116 of the Plaintiffs' Third Amended Complaint.

6.

As to Paragraph 15, 17, 19, 24, 29, 31, and 32, these Defendants admit only that Ann Veneman is the Secretary of Agriculture and that the Beef Promotion and Research Act was enacted at 7 U.S.C. §§ 2901-11. The federal legislation speaks for itself.

7.

As to Paragraph 69, these Defendants deny the allegation to the extent that it implies this was the only communication with the Court. Such correspondence should have no bearing on Plaintiffs' causes of action.

8.

That as an affirmative defense, the alleged actions of the USDA set forth in the Plaintiffs' claims in their Third Amended Complaint, and the assessments and expenditures made pursuant to the Beef Promotion and Research Act constitute governmental speech and do not infringe, or violate the Plaintiffs' First Amendment rights.

9.

That as an affirmative defense, the expenditures and assessments made pursuant to the Beef Promotion and Research Act do not violate the Plaintiffs' First Amendment rights because the USDA, and the United States Government, have a substantial interest in the programs, assessments, and expenditures that are part of the Beef Promotion and Research Act; the programs, assessments and expenditures of the Beef Promotion and Research Act directly advance that interest; and the programs, assessments, and expenditures of the Beef Promotion and Research Act are not more extensive than necessary to serve those governmental interests.

10.

That as a further affirmative defense, the Plaintiffs failed to exhaust their administrative remedies.

11.

That as a further affirmative defense, the beef industry and the Beef Promotion and Research Act, 7. U.S.C. §§ 2901-11, are part of a regulatory scheme or program and comprehensive statutory program for agricultural marketing, which are closely akin to that of the California tree fruit industry, and distinguishable from that of the mushroom industry. As such, Plaintiffs' challenge to the constitutionality of the Beef Promotion and Research Act is controlled by the Supreme Court's opinion in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), as opposed to *United States v. United Foods, Inc.*, 121 S. Ct. 2334, 150 L. Ed. 2d 438.

Plaintiffs' Complaint violates Fed. R. Civ. P. 8(a), in that it is not a short and plaint statement of the claim.

WHEREFORE, Defendants, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones, request the following relief as to their Answer to Plaintiffs' Third Amended Complaint:

1. That all counts of the Plaintiffs' Third Amended Complaint be dismissed on their merits with prejudice and that these Defendants be entitled to their costs and disbursements herein.

2. For such other and further relief as the Court deems equitable.

Dated this 19th day of September, 2001.

Respectfully submitted,

FRIEBERG, ZIMMER, DUNCAN & NELSON, L.L.P.

By: Signature Illegible

Robert B. Frieberg
Gregory T. Brewers
Jeffrey A. Cole
Attorneys for Intervenors - Defendants
P.O. Box 511
Beresford, SD 57004-0511
(605) 763-2107

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1632

LIVESTOCK MARKETING, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL., INTERVENOR-DEFENDANTS

JOINT STATEMENT OF STIPULATED FACTS

The parties to the above-captioned action hereby stipulate to the following undisputed material facts:

1. The Cattlemen's Beef Promotion and Research Board ("Board") was established pursuant to the Beef Promotion and Research Act of 1985 ("Act"), 7 U.S.C. §§ 2901-11, and the Beef Promotion and Research Order ("Order"), 7 C.F.R. Part. 1260.

2. The Board is funded wholly through assessments on the sale of cattle and on the importation of cattle, beef and beef products.

3. In the last fiscal year, over $87 million of assessments were collected under the Act. The Beef Board's

budget during the past fiscal year was approximately $67 million.[1]

4. The Board funds advertising and promotion, research, consumer information, and industry information projects. The Board also funds foreign marketing projects, producer communications, program development, evaluation and administration. In the past fiscal year, the Board's foreign marketing budget was approximately $7.5 million.

5. The Board's advertising and promotion projects include all of the Board's activities intended to advance the image and desirability of beef and beef projects, with the intent of improving the competitive position, and stimulating sales, of beef and beef products in the marketplace. The Board's advertising and promotion programs include TV spots, radio and print ads, brochures, and point of sale materials. These include campaigns with general themes to promote beef, such as the "Beef, It's What's For Dinner" campaign. The advertising is directed primarily at consumers and foodservice operators. In the past fiscal year, the Board's advertising and promotion budget was approximately $34 million. Attached hereto as Exhibit A – are examples of some of the Board's advertising and promotion projects.

6. The Board's research projects include studies intended to improve the safety and quality of beef and beef products, including studies to determine how to

---

[1] The Board's budget consists of assessments collected during the year, plus leftover funds from prior years, minus that portion of the assessments retained by Qualified State Beef Councils, which are entitled to retain up to 50 cents for every dollar collected from domestic produces under the Act.

eliminate food-borne pathogens such as *E. Coli*, Salmonella, and Listeria; studies relating to the nutritional value of beef and beef products; as well as research into new product and market development. The results of many of the research projects funded by the Board are distributed as part of the Board's industry information and consumer information programs. In the past year, the Board's research budget was approximately $10 million. Attached hereto as Exhibit B is a summary of Board-funded research for the year 2000. The results of some of these research projects are included as examples of the consumer and industry information projects attached hereto as Exhibits C and D, respectively.

7. The Board's consumer information projects develop and distribute information to consumers regarding the purchase, preparation and use of the beef and beef products. These projects are in the nature of public and media relations, and are intended to deliver messages to health influencers (doctors, nurses, and dieticians), food editors, and educators. In the past fiscal year, the Board's consumer information budget was approximately $7.5 million. Attached hereto as Exhibit C are examples of some of the Board's consumer information projects.

8. The Board's industry information projects are intended to lead to the development of new markets, marketing strategies, and increased efficiency and enhance the image of the cattle industry. These projects are in the nature of issues management projects, and provide information to producers to help them produce safe and palatable beef that consumers want to buy, as well as information regarding issues affecting the beef industry. In the past fiscal year, the Board's industry information budget was approximately $2

million. Attached hereto as Exhibit D are examples of some of the Board's industry information projects.

Dated: October 18, 2001.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

MICHELLE TAPKEN
United States Attorney

CHERYL DUPRIS
Assistant United States Attorney

/s/ ILLEGIBLE
THOMAS MILLET
ORI LEV
CAROLYN McKEE
Attorneys
United States Department of Justice
Civil Division
P.O. Box 883
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 514-2395
Fax: (202) 616-8202

Attorneys for Defendants

JOHNSON, HEIDEPREIEM, MINER, MARLOW & JANKLOW, L.L.P.

/s/ RONALD A. PARSONS, JR.
Scott N. Heidepriem
Ronald A. Parson, Jr.
431 North Phillips Avenue, Suite 400
Sioux Falls, SD 57104-5933
(605) 338-4304

OLSSON, FRANK & WEEDA, P.C.
Philip C. Olsson
Ryan W. Stroschein
1400 Sixteenth Street, N.W., Suite 400
Washington, D.C. 20036-2220
(202) 789-1212

Attorneys for Plaintiffs

FREIBERG, ZIMMER, DUNCAN & NELSON, L.L.P.

/s/ GREGORY T. BREWERS
Robert B. Freiberg
Gregory T. Brewers
Jeffrey A. Cole
P.O. Box 511
Beresford, SD 57004-0511
(605) 763-2107

Attorneys for the Intervenors-Defendants



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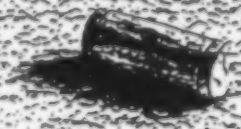
BEEF

Funded by America's Beef Producers.

Of course you don't have to serve veal, just like you don't have to serve wine with a cork.



Roasted Veal Chop and Spaghetti Squash with Veal Bacon



You do a lot to impress your customers and your menu should reflect this. By serving veal, you show your commitment to quality, creativity and class. And that's something to toast to.

Veal

Eat smart. Eat veal.

For menu ideas and recipes call 1-888-854-VEAL (8325). Or contact us on the web at www.veal.org.

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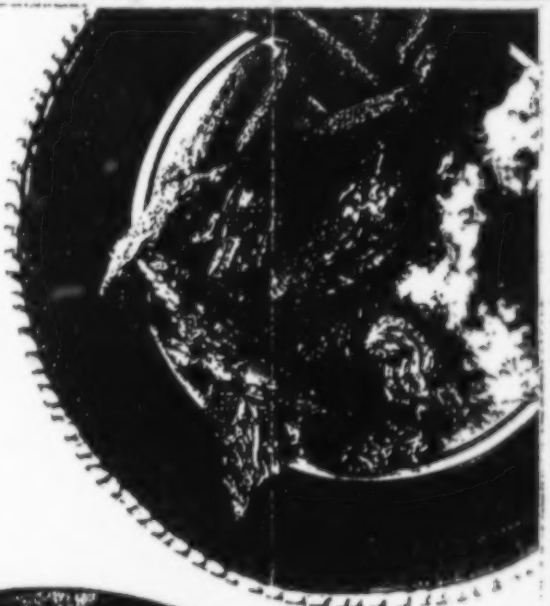
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INTRODUCING THE NEW CASUAL CUTS OF VEAL.

We've gotten in touch with our casual side and you're going to like the new veal. With dozens of new products specifically created for casual restaurants, you'll be surprised by the many ways veal can add excitement to your menu. You'll be surprised by how affordable they are, too. Call 1-888-854-VEAL or visit our web site at www.veal.org to find out more.

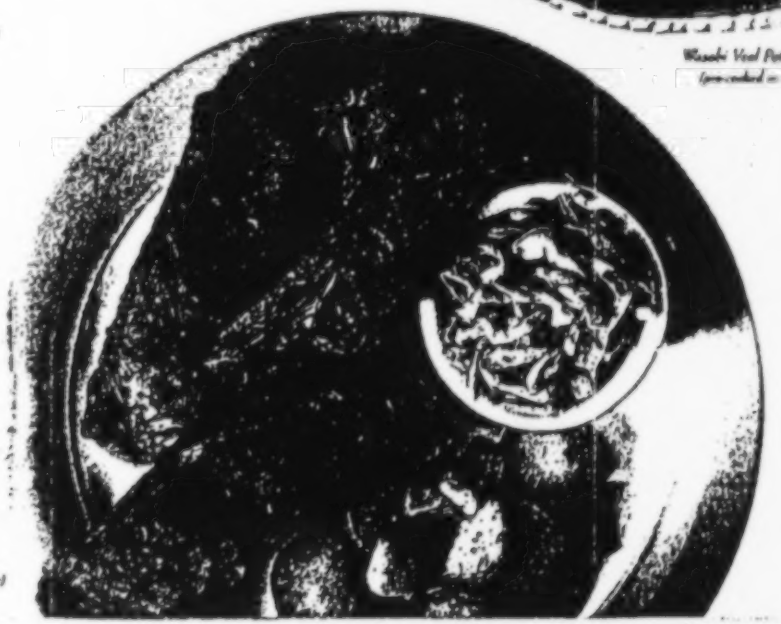
Veal



Wasabi Veal Pot Roast
(pre-cooked or raw)



Andouille Veal Sausage
(pre-cooked)



Veal Ribs
with Cola Sauce
(pre-cooked or raw)

VEAL SAUSAGE · VEAL PARMESAN DIPPERS · VEAL RIBS · PRE-COOKED OSSO BUCO · PRE-COOKED VEAL POT ROAST · CHICAGO VEAL CHOP · GROUND VEAL · PRE-COOKED VEAL PATTIES
VEAL BACON · VEAL SHOULDER SCALLOPINI · VEAL MINI RACK · VEAL GLACE/DEMI GLACE · BREADED VEAL CUTLETS, MEDALLIONS & SCALLOPINI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

[Filed December 29, 2000]

DECLARATION OF NANCY ROBINSON

I, Nancy Robinson, declare:

1. I am the Vice President for Government and Industry Affairs at the Livestock Marketing Association ("LMA"). LMA is a trade association representing livestock marketing businesses, which was established

in 1947 as the National Livestock Auction Association. LMA currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers.

2. I have been employed with LMA for 11 years. Prior to my employment with LMA, I was a political appointee at the United States Department of Agriculture, where I served as the Director of Information and Legislative Affairs of the Food Safety and Inspection Service from 1981 to 1987, and the Director of Information and Legislative Affairs of the Animal and Plant Health Inspection Service from 1987 to 1988.

3. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion Act, more than $1 billion has been expended from assessments on cattle producers, but beef demand has continued to drop. Exhibit 25. Per capita beef consumption, which had risen through the '60s and '70s to a high point of 89.0 pounds per capita in 1976, had fallen off by 16 percent to 74.7 pounds per capita in 1985, and by 1988, per capita consumption had fallen an additional 13.4 percent, to 64.7 pounds, a full 27 percent lower than the peak consumption of 1976. Exhibit 25.

4. Not only were consumers purchasing much less beef by 1998, but also prices were to frustratingly low levels. Exhibit 6. The low point for cattle prices came at the end of April, 1996, when the popular TV host and commentator Oprah Winfrey responded to panelists discussing a livestock disease by stating that she did not think she could eat beef anymore. Exhibit 5. Within a week cattle prices had dropped to $55 per hundredweight. Unfortunately, prices did not recover significantly in 1997 or in 1998. The Western Kansas

price for fed steers, for example, was below $60 for much of 1998 and never above $70. Livestock Marketing Information Council, 1997-1998, Beef Price Chart. Exhibit 6.

5. During 1997 and 1998, livestock markets found themselves deducting assessments from prices which were already not sufficient to cover producer costs. Producers expressed extraordinary frustration regarding these assessments at livestock markets. As a service to customer-cattlemen, LMA and its members decided to initiate a petition drive to obtain a referendum on continuation of the program. LMA undertook this action to provide producers throughout the United States with an opportunity to have input into the decision whether the program should be continued, terminated or revised.

6. Beginning in 1997, LMA members directed LMA to explore the appropriate procedures for submitting petitions seeking a referendum.

7. In 1997 and early 1998, LMA made inquiries to the Secretary concerning the petition process for a beef referendum. In March, 1998, USDA wrote to LMA, stating to provide current requirements and a sample petition. Exhibit 7. The materials provided by USDA contained sample language for the petition, which LMA adopted in its entirety, and stated that the petition must contain a signature, the date of each signature, the printed name of the signer, the signer's company name (if applicable), the signer's full address, and the signer's telephone number. Exhibit 7. USDA further instructed that each person signing a petition must be subject to assessments under the Beef Promotion and Research Order. Exhibit 7. There was no suggestion that persons signing the petition would be required, at

a later date, to provide additional information or submit personal documents.

8. In an April 9, 1998, letter to LMA's president, William Irons, USDA provided further advice to LMA that initiation of a referendum would require: (1) the verification of 116,791 valid signatures; (2) the determination that the persons who signed the petition are "a representative group of cattle producers," and (3) a decision by the Secretary to conduct the requested referendum. Exhibit 8.

* * * * *

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct. Executed on December 24, 2000, in Downs, Kansas.

/s/ NANCY J. ROBINSON
NANCY ROBINSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF ROBERT M. THULLNER

I, Robert M. Thullner, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual who raises cattle and signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to release or suppress the market obtained by United States cattle producers such as myself. I object to the messages conveyed and

object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ ROBERT M. THULLNER
ROBERT M. THULLNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF JOHN L. SMITH

I, John L. Smith, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual who raises cattle and signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages con-

veyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ JOHN L. SMITH
JOHN L. SMITH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF PAT GOGGINS

I, Pat Goggins do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an Angus breeder, cow/calf operator, and cattle feeder. I estimate that I pay approximately $30,000 annually in beef checkoff assessments. I am the President of the Livestock Marketing Association and owner of Public Auction Yards in Billings, Montana.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages con-

veyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections in the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

9. I also object to the use of mandatory assessments against them for the promotion and advertising of generic beef, as opposed to specific breeds or brands of beef which I believe to be superior types of beef. I object to being charged for a contrary message.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ PAT GOGGINS
PAT GOGGINS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF HERMAN SCHUMACHER

I, Herman Schumacher, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual who owns a feedyard in South Dakota and pays the mandatory beef checkoff assessments. I also own Herried Livestock Market, Inc. in Herreid, South Dakota.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising for beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages

conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ HERMAN SCHUMACHER
HERMAN SCHUMACHER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF JERRY GOEBEL

I, Jerry Goebel, do hereby declare:

1. I am a cattle producer and have paid and been subject to the mandatory one-dollar-per-head assessment required by the Beef Research and Promotion Order.

2. I am an individual cattle producer as defined by the Act.

3. I have some objections to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which I am compelled to pay as a cattle producer.

4. I would like to convey the message that United States cattle and beef are superior to imported beef. I object to being charged for a contrary message, one which promotes beef as a generic commodity. I object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. I believe United States beef to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. I object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle, and the association of beef from United States fed cattle with beef from imported cattle.

7. I believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers such as myself. I object to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. I also object to the use of mandatory assessments against me for the promotion, advertising, development, or support of generic, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. And I have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ JERRY GOEBEL
JERRY GOEBEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF PAT GOGGINS

ON BEHALF OF LIVESTOCK MARKETING ASSOCIATION

I, Pat Goggins, do hereby declare:

1. I am currently the President of the Livestock Marketing Association.

2. I would estimate that approximately 90 percent or more of Livestock Marketing Association members are cattle producers subject to the mandatory assessments under the beef checkoff.

3. I have attached as Exhibit A to this Declaration a true and correct copy of the bylaws of the Livestock Marketing Association.

4. Plaintiff Livestock Marketing Association (LMA), 7509 Tiffany Springs Parkway, Kansas City, MO 64153-2315, is a trade association representing livestock marketing businesses, which was established in 1947 as the National Livestock Auction Association. It is incorporated as a not-for-profit organization in the State of Missouri, and its members are persons engaged in operating livestock markets, who regularly engage in the sale of cattle. The Livestock Marketing Association currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers. Approximately 90 percent of LMA members are market operator and dealers who also have cattle production operations and therefore are subject to and pay as well as collect the mandatory beef checkoff assessments.

5. On behalf of LMA and its members, LMA objects to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which they are compelled to pay as cattle producers.

6. On behalf of LMA and its members, LMA would like to convey the message that United States cattle and beef are superior to imported beef, object to its cattle producer members being charged for a contrary

message, one which promotes beef as a generic commodity, and further object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

7. On behalf of LMA and its members, LMA believes that United States beef is superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and generally inferior and of lesser quality.

8. On behalf of LMA and its members, LMA objects to the promotion of U.S. beef and imported beef as a single, generic commodity and to the promotion of imported beef as indistinguishable from beef from United States fed cattle, and to the association of beef from United States fed cattle with beef from imported cattle.

9. On behalf of LMA and its members, LMA believes that the generic advertising of U.S. beef and imported beef as a single commodity, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by United States cattle producers, and therefore objects to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

10. On behalf of LMA and its members, LMA also objects to the use of mandatory assessments against its cattle producers for the promotion, advertising, development, or support of generic, brand-name and/or

processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers, and have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

/s/ PAT GOGGINS
PAT GOGGINS
President,
Livestock Marketing Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, AN ASSOCIATION OF LIVESTOCK MARKETS, THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, AN ASSOCIATION OF GRASSROOTS ORGANIZATIONS THAT SEEK TO PROTECT NATURAL RESOURCES, FAMILY FARMS, AND RURAL COMMUNITIES, AND ROBERT THULLNER, JOHN L. SMITH, AND ERNIE J. MERTZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; DAN GLICKMAN, SECRETARY OF AGRICULTURE, AND THE CATTLEMEN'S BEEF BOARD, AN ORGANIZATION OF CATTLE PRODUCERS AND IMPORTERS CHARGED WITH IMPLEMENTING THE BEEF RESEARCH AND PROMOTION ORDER, DEFENDANTS

DECLARATION OF [JOHN D. SMILLIE]

ON BEHALF OF THE WESTERN ORGANIZATION OF RESOURCE COUNCILS

I, John D. Smillie, do hereby declare:

1. I am the Program Director of the Western Organization of Resource Councils ("WORC").

2. Plaintiff Western Organization of Resource Councils ("WORC"), 2401 Montana Avenue, #301, Billings, Montana 59101, is an association of grassroots organizations which, in turn, are composed of affiliated citizens' groups based in 42 communities throughout the region. Members of WORC include the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), the Powder River Basin Resource Council (Wyoming) and the Western Colorado Congress (Colorado). The members of these groups are farmers, ranchers, small business and working people who seek to protect natural resources, family farms, and rural communities, including cattle producers who are subject to and pay the mandatory beef checkoff assessments. A large percentage of the members of WORC's member organizations are cattle producers who are subject to and pay the mandatory beef checkoff assessments.

3. On behalf of WORC's member organizations and their members, WORC objects to the general content of the promotion, advertising, and other activities funded by the mandatory assessments under the beef checkoff which they are compelled to pay as cattle producers.

4. On behalf of WORC's member organizations and their members, WORC would like to convey the message that United States cattle and beef are superior to imported beef, object to cattle producer members being charged for a contrary message, one which promotes beef as a generic commodity, and further object to the use of mandatory checkoff dollars for the generic promotion and advertising of beef and imported beef, as opposed to United States beef in particular.

5. On behalf of WORC's member organizations and their members, WORC believes that United States beef is superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality.

6. On behalf of WORC's member organizations and their members, WORC objects to the promotion of U.S. beef and imported beef as a single, generic commodity and to the promotion of imported beef as indistinguishable from beef from United States fed cattle, and to the association of beef from United States fed cattle with beef from imported cattle.

7. On behalf of WORC's member organizations and their members, WORC believes that the generic advertising of U.S. beef and imported beef as a single commodity, funded in part by importers of foreign beef and foreign cattle, may increase the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce or suppress the market prices obtained by the United States cattle producers, and therefore object to the messages conveyed and object to financing advertising for the benefit of beef from imported cattle.

8. On behalf of WORC's member organizations and their members, WORC also objects to the use of mandatory assessments against its cattle producers for the promotion, advertising, development, or support of generic, brand-name and/or or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers, and have objections to the advertising and promotional activities funded by the mandatory assessments because the beef packers, beef processors, and

beef retailers who are in the best position to gain any alleged benefits of those activities are "free riders" who do not share in the cost or pay any assessments.

9. I have attached as Exhibit A to this declaration a true and correct copy of the mission statement (or by-laws, whichever is appropriate) of the Western Organization of Resource Councils.

I HEREBY DECLARE under penalties of perjury that the foregoing is true and correct.

Dated this 16th day of October, 2001.

(Illegible)
John D. Smillie, Program Director
Western Organization of Resource Councils

Our dollar builds the business from our state on up..."



Pete and Jo Bonds, with daughter, April

BEEF

Cattlemen's Beef Board

"Our beef checkoff dollar is the only industry-wide, self-help tool cattlemen have to promote beef now and in the future."

Our beef checkoff is fair: All producers and importers pay the same $1 per head.

Our beef checkoff is state-based: One-half of the money collected — 50 cents of every dollar — is controlled by state beef councils.

Our beef checkoff is accountable: All checkoff-funded programs are budgeted and evaluated by the Beef Board, an independent organization of 111 "grassroots" volunteers.

Our beef checkoff is producer-led: Board members are nominated by fellow state producers.

Find out more about your beef checkoff, call toll-free: 1-888-565-BEEF.

BEEF

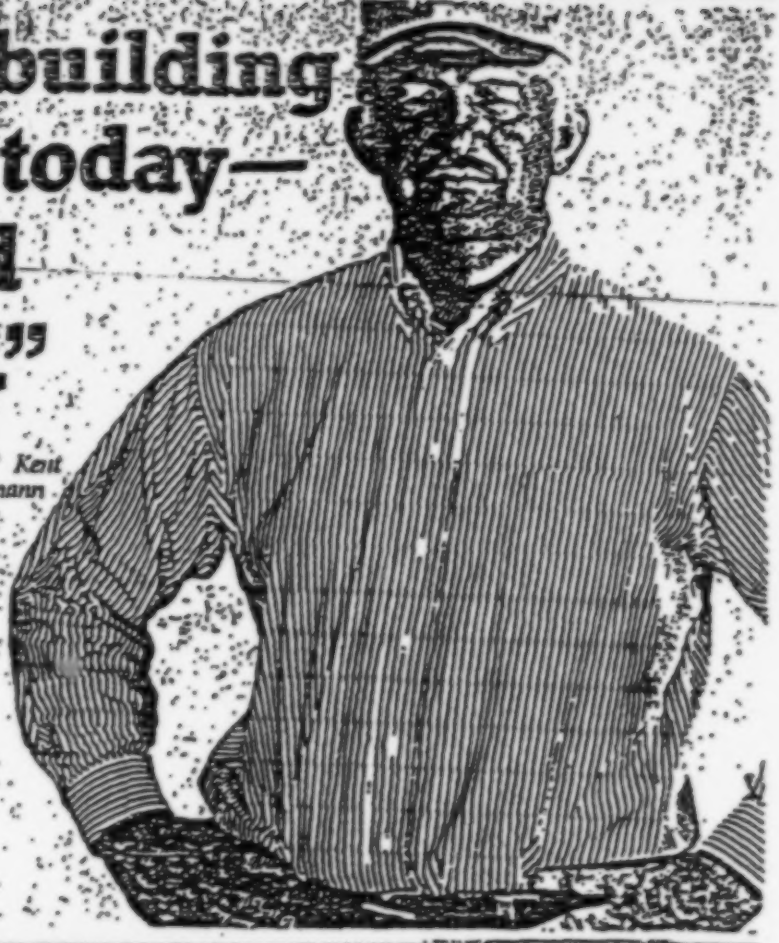
Your beef checkoff

PLAINTIFF'S EXHIBIT 26A

BEST AVAILABLE COPY

My dollar's building the future today— for me and my family."

Kent Pruismann



BEEF

"Your beef checkoff dollar is the only industry-wide, self-help tool cattlemen have to promote beef now and in the future."

Cattlemen's Beef Board

Here are a few examples of the good work your dollar did for your cattle industry:

Your beef checkoff brings accurate nutrition education to millions of kids: More than 24 million preschoolers have heard about the importance of beef in a well-balanced diet thanks to checkoff-funded "Munchster" kits aimed at educating our future consumers.

Your beef checkoff pays for research to improve the safety of beef: From processing to packaging to preparation, 22 recent checkoff-funded food safety studies have already paid off in new procedures, techniques or products to ensure beef safety.

Your beef checkoff helps develop new, quick-to-prepare, value-added products: Pre-cooked, heat 'n eat chuck and round main courses, such as pot roast, appeal to the 40% of Americans who choose dinner based on ease of preparation.

Find out more about your beef checkoff, call toll-free: 1-888-565-BEEF.

BEEF

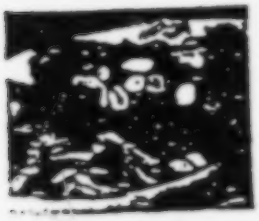
Your beef checkoff builds the future today

"Thanks to my beef checkoff, pot roast is now fast food for families with no time to cook."



My dollar did it. My beef checkoff dollar is helping develop new *heat 'n eat* main courses using chuck and round cuts. They're fully cooked when consumers buy them and ready to serve in less than 10 minutes. Best of all, they're not only fast, they taste great.

These new, value-added products really appeal to the 40% of Americans who choose dinners based on ease of preparation. And they might never have happened without the help of my checkoff dollar. Now, I know these *heat 'n eat* meals are just one step in strengthening our industry. But they're helping build a future business my kids can be part of. That gives me a sense of pride faster than you can say "Dinner's ready!"



To find out more about our beef checkoff, contact your state beef council or the Cattlemen's Beef Board.

BEEF

Our beef checkoff, working for the future today.

Kent Pruismann, cattle producer

©1998 Cattlemen's Beef Board
PO Box 3118, Englewood, CO 80155
WBA 1548

PLAINTIFF'S EXHIBIT
26 B

"Thanks to my checkoff, consumer confidence in beef safety is well-deserved."



My dollar did it. My checkoff dollar funds research that enhances beef safety from processing through packaging and preparation. In fact, 22 recent checkoff-funded food safety studies have already paid off in new procedures, techniques or products to ensure beef safety. Consumers feel good about serving beef to their families when they know it's a safe and wholesome food.

Improving the safety of an already safe product is just one step in strengthening our industry. But it's supporting and building consumer confidence in beef now and for the future. That extra margin of beef safety means my family can feel a little more secure in the cattle business. To me, that's a fair return for a buck.

Find out more about your beef checkoff. call toll-free: 1-888-565-BEEF.

BEEF

Your beef checkoff builds the future today.

Kent Pruismann

84

"Thanks to my checkoff, millions of kids are seeing how beef belongs in a balanced diet."



My dollar did it. My beef checkoff dollar has helped send out 134,000 nutrition education kits to preschoolers and their teachers over the last several years. Now, more than 24 million kids have seen and heard the real story about beef in a balanced diet. And, they're forming good eating habits they can keep for the rest of their lives.

Giving kids the facts about beef is just one step in strengthening our industry. But it's helping them learn to ask for beef now and in the future. And that means my son can continue in our family business that my grandfather started. To my way of thinking, the checkoff is an educational investment that really pays off.

Find out more about your beef checkoff, call toll-free: 1-888-565-BEEF.



Kenny Rogers with son, Jare

BEEF

Your beef checkoff builds the future today.

"Thanks to my beef checkoff, pot roast is now fast food for families with no time to cook."



My dollar did it. My beef checkoff dollar is helping develop new *heat 'n eat* main courses using chuck and round cuts. They're fully cooked when consumers buy them and ready to serve in less than 10 minutes. Best of all, they're not only fast, they taste great.

These new, value-added products really appeal to the 40% of Americans who choose dinners based on ease of preparation. And they might never have happened without the help of my checkoff dollar. Now, I know these *heat 'n eat* meals are just one step in strengthening our industry. But they're helping build a future business my kids can be part of. That gives me a sense of pride faster than you can say "Dinner's ready!"



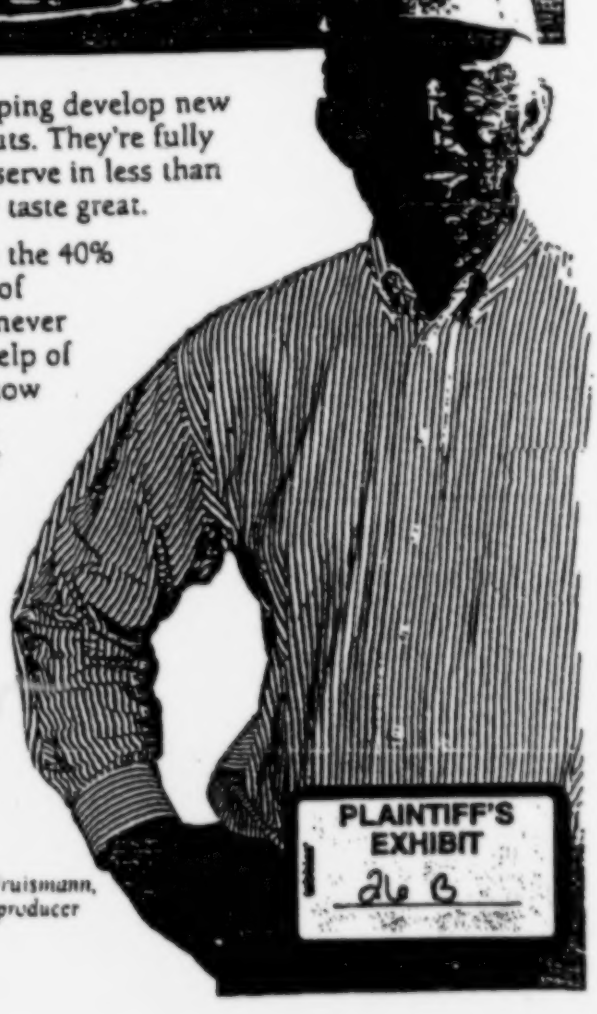
To find out more about our beef checkoff, contact your state beef council or the Cattlemen's Beef Board.

BEEF

Our beef checkoff, working for the future today.

Kent Pruismann, cattle producer

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PO Box 3316, Englewood, CO 80155
WWA 1548



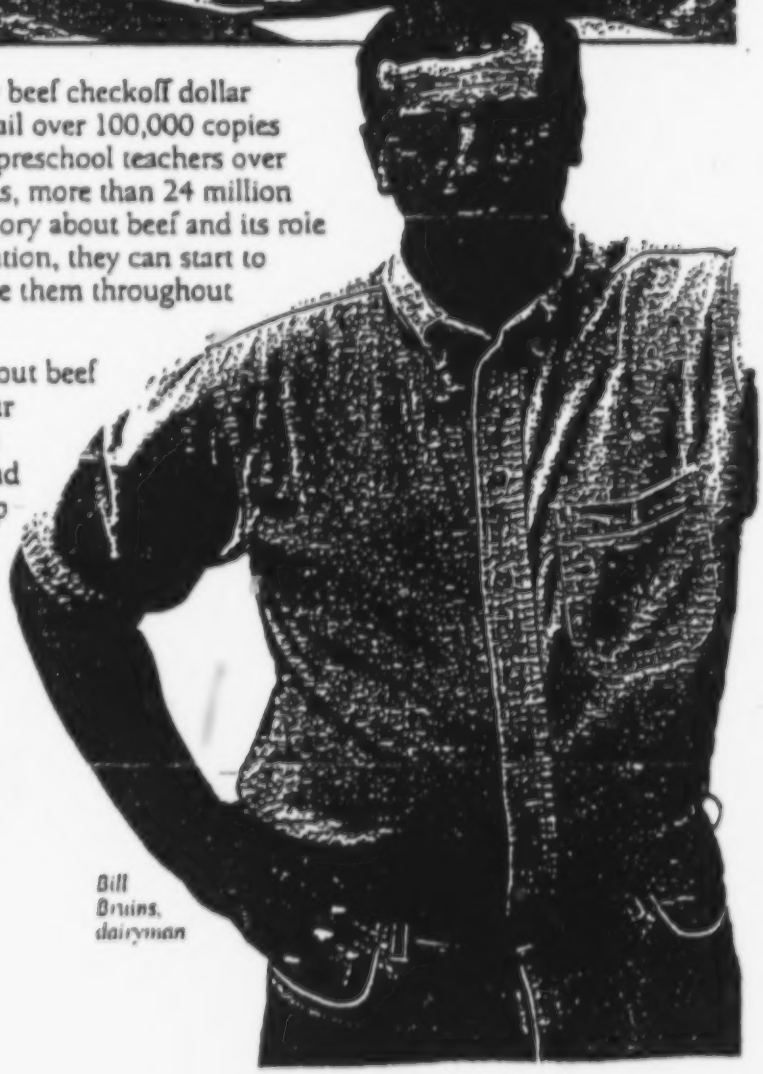
"Thanks to my checkoff, kids are hearing the real story about beef."



My dollar did it. My beef checkoff dollar helped develop and mail over 100,000 copies of the "Munchsters" teaching aids to preschool teachers over the last few years. Thanks to these kits, more than 24 million kids have been able to hear the real story about beef and its role in a nutritious diet. With this information, they can start to build healthy eating habits that'll serve them throughout their lives.

Showing school kids the real story about beef may just be a beginning in making our industry a better one. But I believe it's going to help all of us in the future and make it possible for my family to keep doing what we love to do. That's why I think the checkoff works.

To find out more about our beef checkoff, contact your state beef council or the Beef Board.



Bill Bruins, dairyman

BEEF

Our beef checkoff, working for the future today.

©1998 Beef Board
PO Box 3316, Englewood, CO 80155
WWC 1667

"Thanks to my checkoff, millions of kids are seeing how beef belongs in a balanced diet."



My dollar did it. My beef checkoff dollar helped send out 134,000 nutrition education kits to preschoolers and their teachers over the last several years. Now, more than 24 million kids have seen and heard the real story about beef in a nutritious diet. And they're forming good eating habits they can keep for the rest of their lives.

Giving kids the facts about beef is just one small step in strengthening our industry. It's helping them learn to ask for beef now and in the future. And that means my son can continue on the ranch that's been in the family for almost 100 years. To my way of thinking, the checkoff is an educational investment that really pays off.

To find out more about our beef checkoff, contact your state beef council or the Cattlemen's Beef Board.

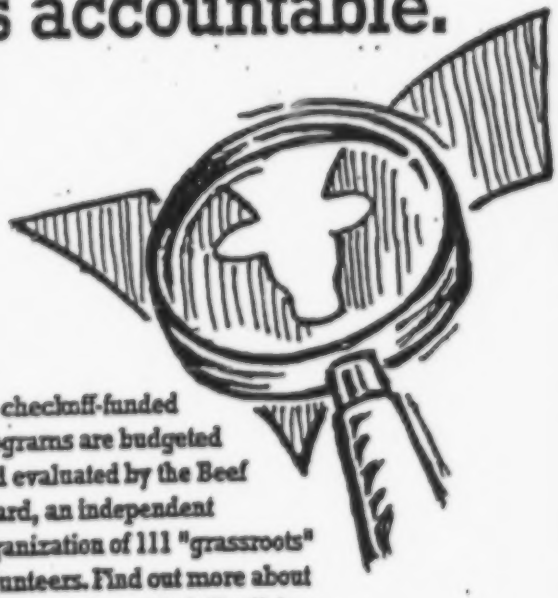
BEEF

Our beef checkoff, working for the future today.

©1990 Cattlemen's Beef Board
PO Box 3316, Englewood, CO 80155
WWB 1348

Kenny Rogers and son Joce, cattle producers

Your beef checkoff is accountable.



All checkoff-funded programs are budgeted and evaluated by the Beef Board, an independent organization of 111 "grassroots" volunteers. Find out more about your beef checkoff. Call toll-free 1-888-565-BEEF.

BEEF

Your beef checkoff builds the future today.

Your beef checkoff is producer-led.



Board members are nominated by fellow state producers.
Find out more about your beef checkoff.
Call toll-free 1-888-S65-BEEF.

BEEF

Your beef checkoff builds the future today.

Your beef checkoff is state-based.

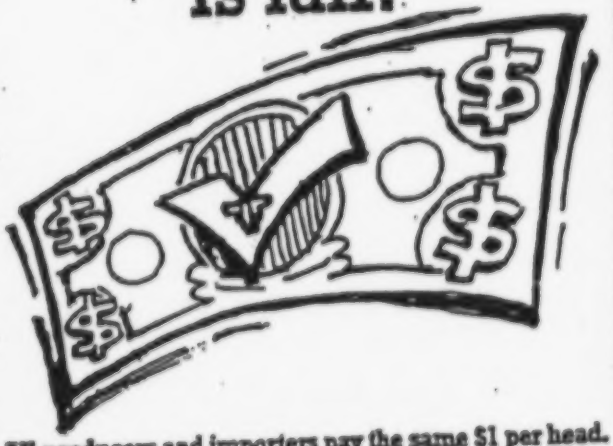


One-half of the money collected--50 cents of every dollar--is controlled by state beef councils. Find out more about your beef checkoff. Call toll-free 1-888-565-BEEF.

BEEF

Your beef checkoff builds the future today.

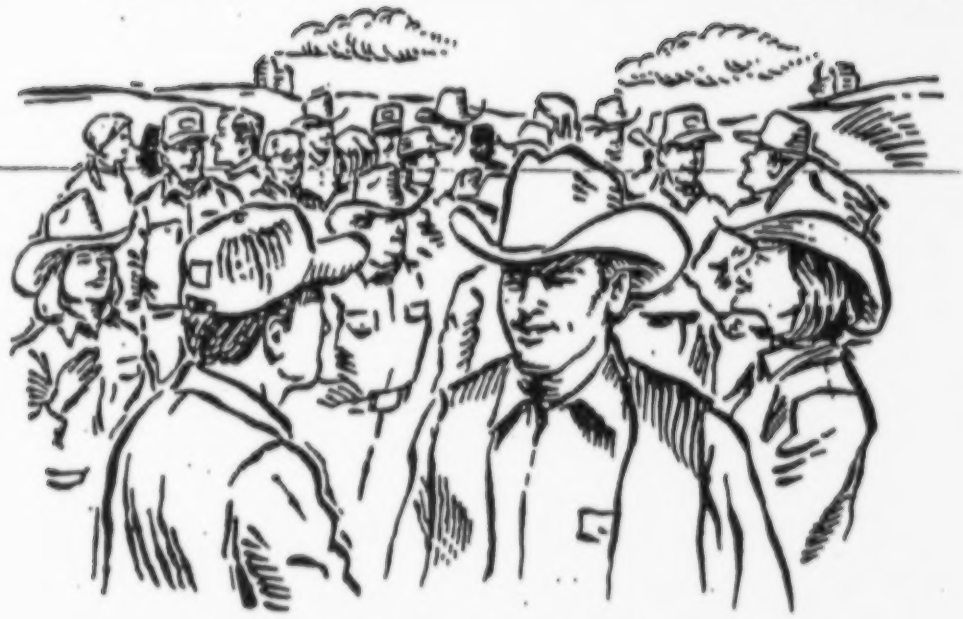
Your beef checkoff is fair.



All producers and importers pay the same $1 per head.
Find out more about your beef checkoff.
Call toll-free 1-888-565-BEEF.

BEEF

Your beef checkoff builds the future today.



Our beef checkoff... producers helping producers.

Producers run our beef checkoff.
The beef checkoff is effective because the people making the decisions are producers just like us. They were nominated to their positions by fellow producers. In fact, the Cattlemen's Beef Board is made up of 111 checkoff-paying individuals. That's how we know our best interests are being represented, because what's important to us is also important to the people deciding how our checkoff dollars are used.

Our checkoff is accountable.
Because our state and national checkoff organizations are run by beef producers who are also investors, we know they are carefully judging and evaluating all checkoff-funded projects. When they fund checkoff programs, they are investing their money along with ours. This system of producers working to help producers is what's helping us aim for a better future today.

BEEF

Our beef checkoff, working for the future today.

©1999 Cattlemen's Beef Board, PO Box 3366, Englewood, CO 80155

Our beef checkoff helps us all prepare for the future.



Our beef checkoff works at the state level. One-half of the checkoff funds collected by our state beef council is used right here. These dollars work with national funds to help improve the beef industry in our own state. And the people who decide how these dollars are used are producers who pay the checkoff and understand what's best for our state and our business.

Our beef checkoff is fair for everyone. All producers and importers pay the same $1 per head. We all pay the same, we all benefit. Our checkoff investments are working to increase demand for beef here in our own state as well as in major consumer areas throughout this country and the world. Through our beef checkoff, we're all working for a better future today.

BEEF

Our beef checkoff, working for the future today.

©1999 Cattlemen's Beef Board, PO Box 1316, Englewood, CO 80111

CBB-001

ıy Producers Say They ›port Our Beef Checkoff

›roducers created our checkoff as a self-help ation, research and information program. It was ›ved in 1988 by 79 percent of beef producers in a ndum after grassroots input shaped the program. r 1998, a Producer Attitude Survey conducted by n Research showed that 68 percent of cattlemen ove of the checkoff. The structure of the checkoff ram is based on the following directives:

Is fair. All producers and importers pay the same e head.

Is state based. One-half of the money collected tate beef councils – 50 cents of every dollar – is ected by producers in the state.

Is accountable. All checkoff-funded programs are gated and evaluated by the Beef Board, an pendent organization of 111 checkoff paying nbers.

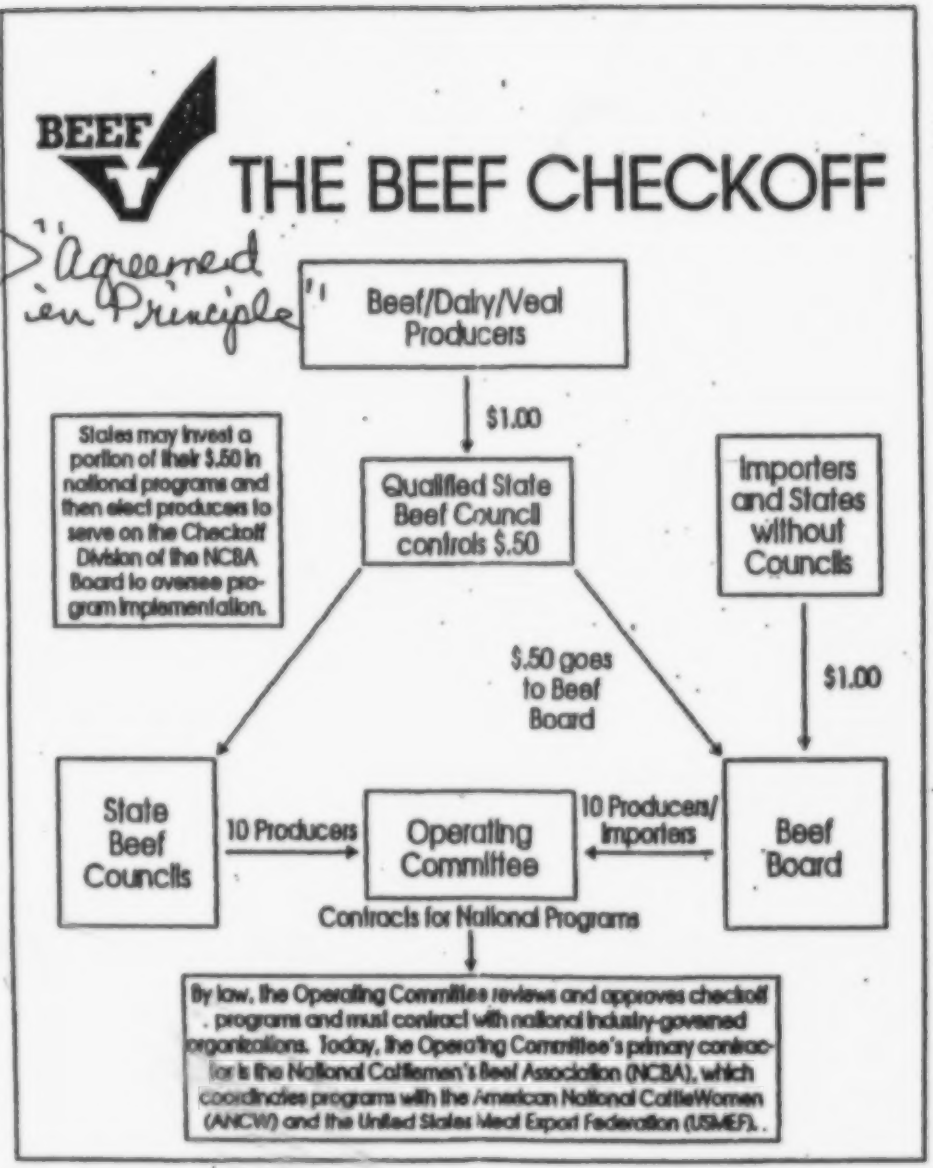
Is producer-led. Beef Board members are minated by fellow state producers.

hat can our checkoff do?

checkoff is the only industry-wide, self-help tool we e to fight for the success of the industry. Our ckoff acts as a catalyst for change. Our checkoff sn't own cattle, packing plants or retail outlets. It n't single-handedly turn around a bad market. We, beef producers, never intended it to be in the ness of growing cattle or handling product. What wanted was a way to stimulate others to sell more at and consumers to buy more beef. This can be ne through direct advertising, cooperative market- , public relations efforts, education programs and w product development assistance.

Vhat can't our checkoff do?

law, our checkoff funds cannot be used to influence vernment policy or action, including lobbying.



Our Beef Checkoff Structure

The Beef Promotion and Research Act outlines the specific responsibilities of the organizations that comprise the checkoff structure.

Beef Board

Created by the Beef Promotion and Research Act to administer the beef checkoff program, the Beef Board consists of 111 members nominated by state producer organizations and importers, all of whom are then appointed by the Secretary of Agriculture. Duties include certification of state beef councils, evaluation of programs, annual budget approval and overseeing the collection of the $1-per-head beef checkoff. Administrative costs for the Beef Board are capped at 5 percent. The Beef Board selects ten of its members to serve on the Operating Committee.

State Beef Councils

State beef councils collect the $1-per-head checkoff and retain control of 50 cents of every dollar to conduct and implement programs in each state that are consistent with the Beef Promotion and Research Act. The councils may invest a portion of their 50 cents in national and international programs, and participate in deciding which programs to fund. Together as a federation, states select 10 members to serve on the Operating Committee.

Operating Committee

Also created by the Beef Promotion and Research Act, the Operating Committee reviews and approves national checkoff programs and contracts with national industry-governed organizations, such as National Cattlemen's Beef Association, to implement programs. Through the Operating Committee, the entire dollar comes together in a coordinated state/national program. Checkoff programs are conducted on a cost-recovery basis. In other words, contractors may not profit from work they do on behalf of the beef checkoff.

BEST AVAILABLE COPY

PLAINTIFF'S EXHIBIT 28C

The Beef Checkoff, your money at work

BY SHARYL PHIPPS

"My family's Holstein dairy and farming operation has been in business since 1840. We know a few things about handling cash flow and what makes good business sense," says Gil Tucker, a dairyman from Finchville, Ky., and 1999 treasurer of the Cattlemen's Beef Board. "I'm pretty tight with my money at home. I'm also tight with money collected by the beef checkoff. As treasurer of the Beef Board, I watch those dollars closely."



Gil Tucker

Tucker was appointed to the CBB in 1994 and has served on its Executive Committee since 1995. He is the first dairyman elected to an officer position on the Board.

"I believe in the beef checkoff program — its effectiveness and its accountability," says Tucker. "If I can't support an industry that I truly believe in with a dollar checkoff, then how can I say that I even support the industry? This is my last year on the Board, and as treasurer, I want to help eliminate confusion in the country about the accountability of funds and the direction of dollars.

"The Beef Board is not a rubber stamp," continues Tucker. "We are all producers who are in business to make money. No good businessman supports an effort that is not on-the-level or takes money out of his pocket. It aggravates me when I hear accusations that the CBB is not accountable or that NCBA is controlling the checkoff."

Strict firewalls are in place to ensure that dues and checkoff dollars are never mixed. The Beef Board is audited by an independent accounting firm every year. Contracting organizations are also periodically audited to test that expenditures of checkoff funds are authorized, that they do not exceed the actual costs of projects, and that they comply with CBB contracts. Prior to the 1996 merger of the National Cattlemen's Association (NCA) and Beef Industry Council (BIC) — which formed the National Cattlemen's Beef Association — NCA and BIC were the primary contractors conducting checkoff programs. Today, NCBA is the primary contractor working with same high level of accountability.

"Although NCBA is the primary contractor," says Tucker, "it does not receive special treatment from the Operating Committee when it comes to funding programs.

The Operating Committee is made up of producers elected by state beef councils and the Beef Board. They all ask tough questions when it comes to funding programs. Last year, more than $10 million in project requests were turned down by the Operating Committee. About half of those programs were proposed by NCBA.

"The program is accountable," continues Tucker, "and fair — everybody pays the same dollar per head, including importers and packers. Packers pay the checkoff whenever they own cattle for more than 10 days before slaughter, or whenever they own cattle through a contract with a local producer. I hear complaints that packers should pay the checkoff on every head slaughtered, but cattlemen designed the checkoff to be producer-controlled. If packers paid a dollar on every head slaughtered, they'd be entitled to some of the Board seats."

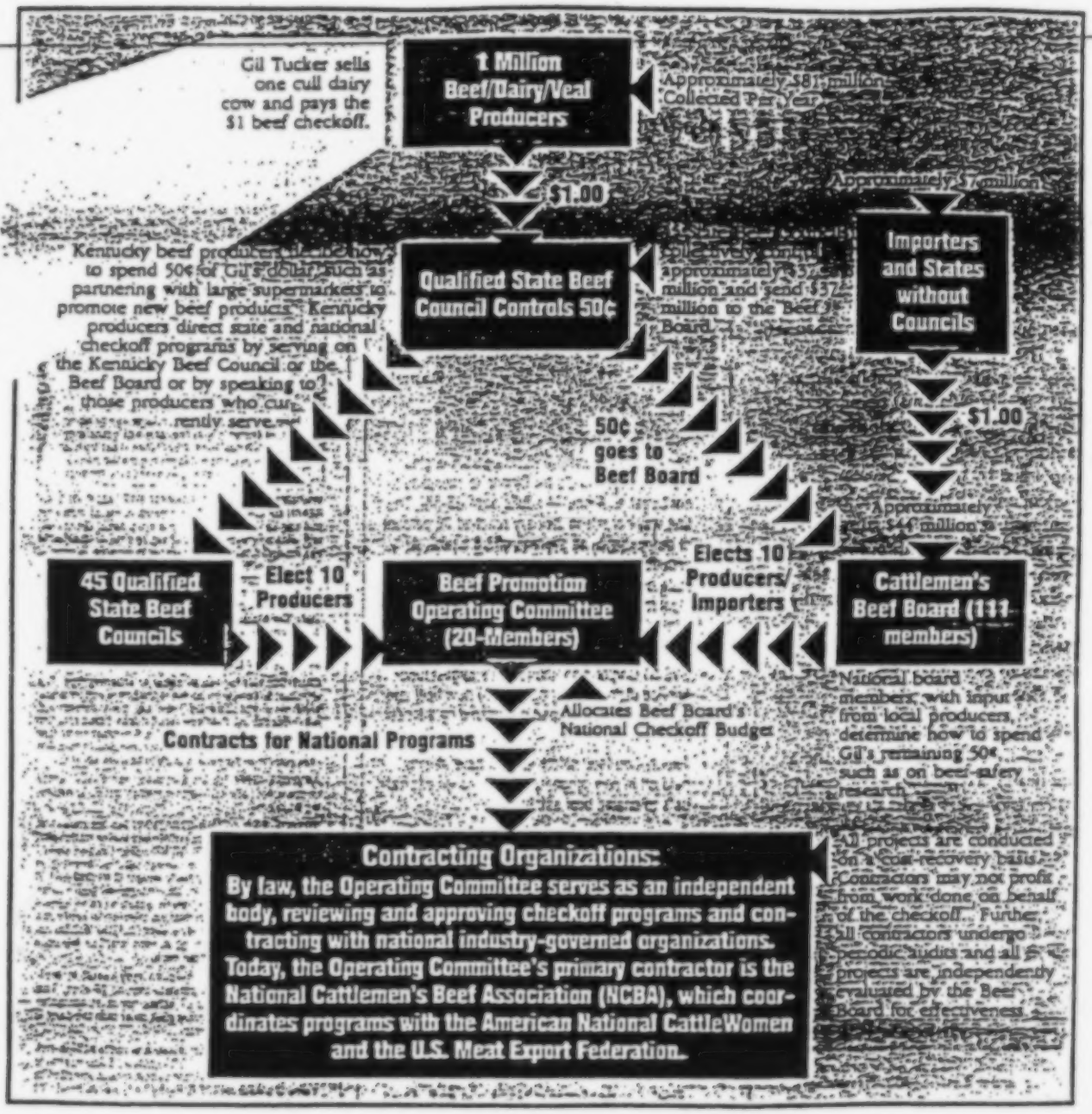
Today, the Board consists of 104 beef, dairy beef and veal producers, as well as seven importers.

"The checkoff works," says Tucker. "As a Beef Board member, I'm accountable to my fellow producers and as treasurer, I'm committed to watching those dollars like I do my own."

The Checkoff

Beef producers created the checkoff as a self-help promotion, research and information program with legislation in the 1985 Farm Bill. It was approved in 1988 by 79 percent of beef producers in a referendum, after grassroots input shaped the program:

- It's fair. Everybody pays the same $1 per head.
- It's state-based. Half of the money collected by state beef councils — 50 cents of every



dollar — is controlled by producers in the state.

- It's accountable. All checkoff programs are budgeted and evaluated by the Beef Board, an independent organization of 111 checkoff-paying volunteers.
- It's producer-led. Beef Board members are nominated by fellow state producers.

The Checkoff: What It Can and Can't Do

The checkoff is the only industry-wide, self-help tool we have to fight for the success of the beef industry. The checkoff acts as a catalyst for positive change. It doesn't own cattle, packing plants or retail outlets. It can't single-handedly turn around a bad market. What beef producers wanted when they created the checkoff was a way to stimulate others to sell more beef and stimulate consumers to buy

(Continued on page 98)

(Continued from page 97)

more beef. This can be done through programs like advertising, new product development and education.

By law, checkoff funds can't be used to influence government policy or action, including lobbying.

The Beef Board

The Cattlemen's Beef Board was created by the Beef Promotion and Research Act to administer the beef checkoff program. It is, and always has been, an independent organization.

The CBB consists of 111 members (representative of geographical regions and cattle populations) nominated by state producer organizations and importers. All of them are then appointed by the U.S. Secretary of Agriculture. Duties include certifying state beef councils, evaluating programs, annual budget approval and overseeing the collection of assessments. Administrative costs for the CBB are capped at 5 percent and in 1998 were 3.1 percent. The CBB selects 10 of its members to serve on the Operating Committee.

State Beef Councils

State beef councils collect the $1-per-head checkoff and retain control of 50 cents of every dollar to conduct and implement programs in each state that are consistent with the Beef Promotion and Research Act. The councils may invest a portion of their 50 cents in national checkoff programs (to assist in reaching international markets and highly-populated areas where fewer dollars are collected), and participate in setting national and international program direction. States caucus to select 10 members to serve on the Operating Committee.

Operating Committee

Also created by the Beef Promotion and Research Act, the Beef Promotion Operating Committee acts as an independent body to review and approve national checkoff programs. It contracts with national industry-governed organizations, such as NCBA, to implement programs. Through the Operating Committee, the entire dollar comes together in a coordinated state/national checkoff program.

The Checkoff Did It

- The current advertising campaign is bringing the "Beef. It's What's for Dinner."® message to our target audience — adults ages 25-54. The first wave of ads in January reached 86 percent of our audience an average of 3.8 times. A second wave of advertising hit in April, with state beef councils extending the campaign with local radio and print advertising, as well as retail and foodservice partnerships with manufacturers of heat-and-serve beef products.
- SYSCO Corporation, the nation's largest foodservice distributor, introduced 30 new beef and veal products developed or inspired by the beef checkoff.
- Twenty-two food safety studies have already paid off in new procedures, techniques or products to ensure beef safety.
- Over the past five years, U.S. beef and beef-variety-meat exports to Japan have increased by 24 percent. In value terms, Japan represents about 55 percent of all U.S. beef and beef variety meat exports.
- Two summer co-op promotions with Arby's were big successes. Stores participating in the promotions moved an average of 2,867 pounds of beef a month — an incremental increase of 300 pounds per store.
- A new education tool for junior and senior high school teachers called "Take a Cook on the Wild Side" was distributed in March and April. About 95 percent of the country's family and consumer science teachers — nearly 20,000 in all — received the kit containing messages about food safety, nutrition, convenience, underutilized beef cuts and new fully-prepared products.
- Sales of U.S. beef to Mexico saw a 32 percent increase in beef and beef-variety-meat purchases (by value) during the first 11 months of 1998 over the same period in 1997. ■

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(918) 250-2010 EXT. 226 / (918) 250-1916 FAX

Circle 45 on the Reply Card

BRIEF SUMMARY

NADA #141-063, Approved by FDA

NuFlor®
(FLORFENICOL)
Injectable Solution 300 mg/mL

For Intramuscular and Subcutaneous Use in Cattle Only.

CAUTION: Federal law restricts this drug to use by or on the order of a licensed veterinarian.

DESCRIPTION: NUFLOR is a solution of the synthetic antibiotic florfenicol. Each milliliter of sterile NUFLOR Injectable Solution contains 300 mg of florfenicol, 250 mg n-methyl-2-pyrrolidone, 150 mg propylene glycol, and polyethylene glycol q.s.

INDICATIONS: NUFLOR Injectable Solution is indicated for treatment of bovine respiratory disease (BRD) associated with *Pasteurella haemolytica*, *Pasteurella multocida*, and *Haemophilus somnus*; and for the treatment of bovine interdigital phlegmon (foot rot, acute interdigital necrobacillosis, infectious pododermatitis) associated with *Fusobacterium necrophorum* and *Bacteroides melaninogenicus*. Also, it is indicated for the control of respiratory disease in cattle at high risk of developing BRD associated with *Pasteurella haemolytica*, *Pasteurella multocida*, and *Haemophilus somnus*.

RESIDUE WARNINGS: Animals intended for human consumption must not be slaughtered within 28 days of the last intramuscular treatment. Animals intended for human consumption must not be slaughtered within 38 days of subcutaneous treatment. Do not use in female dairy cattle 20 months of age or older. Use of florfenicol in this class of cattle may cause milk residues. A withdrawal period has not been established in preruminating calves. Do not use in calves to be processed for veal.

WARNINGS: NOT FOR HUMAN USE. KEEP OUT OF REACH OF CHILDREN. This product contains materials that can be irritating to skin and eyes. Avoid direct contact with skin, eyes, and clothing. In case of accidental eye exposure, flush with water for 15 minutes. In case of accidental skin exposure, wash with soap and water. Remove contaminated clothing. Consult a physician if irritation persists. Accidental injection of this product may cause local irritation. Consult a physician immediately. The Material Safety Data Sheet (MSDS) contains more detailed occupational safety information.

For customer service, adverse effects reporting, and/or a copy of the MSDS, call 1-800-211-3573.

CAUTION: Not for use in cattle of breeding age. The effects of florfenicol on bovine reproductive performance, pregnancy, and lactation have not been determined. Intramuscular injection may result in local tissue reaction which persists beyond 28 days. This may result in even less of usable tissue at slaughter. Tissue reaction at injection sites other than the neck is likely to be more severe.

ADVERSE EFFECTS: Inappetence, decreased water consumption, or diarrhea may occur transiently following treatment.

DOSAGE AND ADMINISTRATION: For treatment of bovine respiratory disease (BRD) and bovine interdigital phlegmon (foot rot): NUFLOR Injectable Solution should be administered by intramuscular injection to cattle at a dose rate of 20 mg/kg body weight (1 mL/100 lbs). A second dose should be administered 48 hours later. Alternatively, NUFLOR Injectable Solution can be administered by a single subcutaneous injection to cattle at a dose rate of 40 mg/kg body weight (1mL/100 lbs). Do not administer more than 10 mL at each site. The injection should be given only in the neck.

NOTE: Intramuscular injection may result in local tissue reaction which persists beyond 28 days. This may result in even less of usable tissue at slaughter. Tissue reaction at injection sites other than the neck is likely to be more severe.

For control of respiratory disease in cattle at high risk of developing BRD: NUFLOR Injectable Solution should be administered by a single subcutaneous injection to cattle at a dose rate of 40 mg/kg body weight (1 mL/100 lbs). Do not administer more than 10 mL at each site. The injection should be given only in the neck.

Clinical improvement should be evident in most treated animals within 24 hours of injection or treatment. If a positive response is not noted within 72 hours of injection or treatment, the diagnosis should be reevaluated.

January 1999

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Livestock and Seed Program

AMS USDA SEARCH

RESEARCH AND PROMOTION PROGRAMS

Beef Promotion and Research Order

History
Major Provisions
Organizational Structure
Production, Exports, and Imports
Economic Evaluation

History

The Beef Promotion and Research Order is authorized by the Beef Promotion and Research Act of 1985 [7 U.S.C. 2901-2918]. The Act was passed as part of the 1985 Farm Bill. The program became effective on July 18, 1986, when the Order was issued. Assessments began on October 1, 1986.

As required by the Act, USDA conducted a referendum among all cattle producers and importers after the program had been in effect no longer than 22 months to determine whether the program should continue. Of the 256,505 valid ballots cast in the May 10, 1988, referendum, 78.91 percent of cattle producers and importers voting favored the program.

TOP

Major Provisions

The program's goal is to strengthen the position of beef in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. The program is funded by a mandatory assessment of $1-per-head collected each time cattle are sold. All producers owning and marketing cattle, regardless of the size of their operation or the value of their cattle, must pay the assessment. A comparable assessment is collected on all imported cattle, beef, and beef products. Assessments under this program, which total about $80 million annually, are used to fund promotional campaigns and to conduct research studies in such areas as heart disease and dietary cholesterol, the role of beef in human diets, and the development of new low-fat, low-cholesterol beef products. In 1996, the total collected from imports was $6.2 million.

TOP

Organizational Structure

The program is administered by the Cattlemen's Beef Promotion and Research Board, which has 111 members representing 37 States and 4 geographical units, with 1 additional unit representing importers. Each year, the Secretary appoints one-third of all Board members from cattle producers and importers nominated by eligible organizations.

The Board administers the Order, approves budgets, and elects 10 members to a Beef Promotion Operating Committee. This Committee--consisting of 20 members (3 Board Officers, 7 Board members, and 10 individuals from State beef councils)--is responsible for developing budgets, awarding contracts, and approving projects for beef promotion and research activities. The Board also elects an 11-member Executive Committee to perform necessary administrative functions and act on behalf of the Board under authority granted by

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the Board between Board meetings.

The Board's office is located in Englewood, Colorado.

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Production, Exports, and Imports

On January 1, 1997, the United States cattle inventory totaled approximately 101.2 million cattle and calves. Texas led in cattle inventory with 14.1 million, followed by Kansas and Nebraska with 6.5 million each.

In 1996, U.S. beef exports totaled 611,456 metric tons valued at approximately $2.4 billion. Japan was largest U.S. market representing 55 percent of exports. Emerging markets for U.S. beef in 1996 were China, Taiwan, Saudi Arabia, and Hong Kong. Exports account for nearly 13 percent of the wholesale value of total U.S. beef production. Additionally, in 1996, the U.S. exported 174,307 head of dairy and beef cattle valued at approximately $113 million.

In 1996, the U.S. imported about 707,685 metric tons of beef valued at approximately $1.3 billion. Additionally, in 1996, U.S. imported approximately 2 million head of live cattle valued at approximately $1.2 billion. Under the beef checkoff program, imports of live cattle are assessed $1.00 per head and imported beef and beef products are assessed an equivalent amount

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Economic Evaluation

Economic evaluations of the program have been conducted periodically since its inception by Dr. Ron Ward of the University of Florida. In his April 1996 publication, "The Beef Checkoff Impact on U.S. Beef Demand," Dr. Ward reports that for the period 1987 through mid-1995 beef checkoff programs have enhanced the demand for beef.

For example, his analyses concludes that the program has resulted in 2.25 percent higher cattle prices, a $4.5 billion increase in producer revenue, and an estimated rate-of-return of $5.70 for every checkoff dollar invested during the 1987 to mid-1995 period.

Thursday, November 8, 2001

Facts About Checkoffs

Your guide to understanding national commodity promotion and research programs.

Prepared by the National Commodity Checkoff Boards and Councils

Straight answers to the most frequently asked questions about national checkoff programs.

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What is a checkoff program?

A checkoff is an industry-funded generic marketing and research program designed to increase domestic and/or international demand for an agricultural commodity. This can be done through promotion, research and new product development, and a variety of other marketing tools. These programs are similar to businesses funded by shareholders (producers, processors, handlers, importers, etc.) with a board of directors that is accountable to the shareholders.

Who pays for the checkoff?

Each checkoff program is supported entirely by its funders. NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED. Contribution rates vary throughout the different checkoffs, but they are always based on a percentage of net sales or assessed at a set rate per production unit. Each checkoff program participant contributes at the same rate, no matter where his or her operation is located.

How do checkoffs benefit farmers, producers, processors, handlers or importers?

The fundamental goal of every checkoff program is to increase commodity demand, thereby increasing the potential long-term economic growth of all sectors of the industry.

Do checkoffs benefit consumers?

Consumers benefit from checkoffs in two ways:

1. Product information to help make informed choices
2. Continual research to create new and improved products that meet consumer quality, safety and nutritional expectations

Who operates a checkoff?

A checkoff is directed by its funders and managed by a professional staff. Funders are responsible for allocating funds and approving business plans and programs. As in any business, professional staffs and contractors are accountable to their boards to meet performance-based goals.

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Checkoffs educate and inform key audiences and lead to product innovations and better choices.

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Do checkoff programs receive government assistance?

No. Checkoffs are funded entirely by their respective industries, NOT by taxpayers or government agencies. Checkoff programs operate much like corporate businesses, with oversight by the federal government to ensure program accountability. In fact, checkoff programs reimburse the U.S. Department of Agriculture (USDA) for its oversight responsibilities.

Which government agency oversees the checkoffs?

All checkoff programs are overseen by the USDA's Agricultural Marketing Service to ensure the programs operate within mandated rules of compliance outlined in its Congressional Act & Order that governs all checkoff operations.

Who started checkoffs?

Checkoff programs are assessments brought into existence by the industry supporting them and made mandatory through an act of Congress. Checkoff program funders retain the right to vote them out of existence.

What was the first checkoff?

The first promotion program was created under the Wool Act in 1954. Twelve other national checkoff programs are now operating under federal legislation.

Are all checkoff programs the same?

Yes and no. All checkoff programs do have a similar goal and purpose – to increase commodity demand and long-term economic growth for the industry. But they all accomplish this in different ways that are suited to the special market structure of each commodity and the desires of their respective boards.

Checkoffs are directed
and fully funded by their respective industries,
to stimulate demand and strengthen industries.

Any more questions?

For more information about individual checkoffs, contact any one of the national checkoff programs listed below:

AMERICAN EGG BOARD
www.aeb.org – (847) 296-7043

CATTLEMEN'S BEEF BOARD
www.beefboard.org – (303) 220-9890

COTTON BOARD
www.cottonboard.org – (901) 683-2500

NATIONAL HONEY BOARD
www.nhb.org – (800) 553-7162

MUSHROOM COUNCIL
www.mushroomcouncil.com – (925) 556-5970

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NATIONAL DAIRY RESEARCH AND PROMOTION BOARD
www.dairyinfo.com – (847) 803-2000

NATIONAL FLUID MILK PROCESSOR PROMOTION BOARD
www.dairyinfo.com – (847) 803-2000

NATIONAL PORK BOARD
www.porkboard.org – (515) 223-2620

NATIONAL POTATO PROMOTION BOARD
(303) 369-7783

NATIONAL WATERMELON PROMOTION BOARD
www.watermelon.org – (407) 895-5100

POPCORN BOARD
www.popcorn.org – (877) POPALOT

UNITED SOYBEAN BOARD
www.unitedsoybean.org – (800) 989-USB1

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E-mail questions and comments to beefboard@beef.org.

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RESPONSIBILITIES OF BEEF BOARD EXECUTIVE COMMITTEE

Responsibilities of Beef Board Executive Committee

Accountability:

- The Executive Committee is held accountable to the Beef Board, producers, USDA and Congress, and placed in a position of trust and confidence to make decisions necessary to administer the terms and provisions of the Act and Order in the general interests of the beef industry, under the direction of the Board and within the guidelines and policies established and approved by the Board.

- The Executive Committee is held accountable to the Beef Board, producers, USDA and Congress for the full $1 per-head checkoff, including the 50 cents retained by qualified state beef councils (QSBCs).

- The Executive Committee is held accountable to the Beef Board, producers, USDA and Congress to ensure that all decisions regarding the allocation, expenditure and governance of checkoff dollars are made in the general interests of the beef industry, and not for the benefit of any particular organization. As a result, the Executive Committee reviews all Operating Committee actions to ensure they are consistent with the Beef Industry Long Range Plan and do not reflect undue influence from a contracting organization.

Compliance:

- On behalf of the Beef Board, the Executive Committee oversees collection efforts of the Beef Board and qualified state beef councils (QSBCs) to ensure national, uniform collection of the $1 per-head checkoff.

- On behalf of the Beef Board, the Executive Committee ensures that checkoff expenditures by QSBCs remain within the parameters of the Act, the Order, and the Beef Board's Guidelines in order to meet the requirements for continued certification. The Executive Committee monitors QSBCs' use of checkoff dollars by requiring each QSBC to submit an annual marketing plan and an annual financial report audited by an independent certified public accountant.

  - *However, the Beef Board and Executive Committee have never taken nor do they intend to take the position of dictating to states how to spend the 50 cents QSBCs retain from each dollar collected.*

Business:

- Acting on behalf of the Beef Board, the Executive Committee conducts general business of the Board between meetings of the full Board, and establishes (subject to full Board approval) policies and guidelines necessary to administer the Act and Order.

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RESPONSIBILITIES OF QUALIFIED STATE BEEF COUNCILS

Responsibilities Common to Qualified State Beef Councils

Accountability:

- QSBCs are held accountable to the Beef Board, producers, USDA and Congress for adhering to the terms and provisions of the Act and the Order.

Compliance:

- QSBCs are responsible for collecting the $1 per-head checkoff in their respective states, and for ensuring a collection compliance system is in place to uniformly collect the dollar.

Marketing Plans:

- Annually, each QSBC must submit to the Beef Board a marketing plan for investing checkoff dollars in state programs that are within the parameters of the Act, the Order, and the Beef Board's guidelines.

Audited Financial Reports:

- Annually, each QSBC must submit to the Beef Board financial statements audited by a certified public accountant.

Producer Communications:

- Since they are closest to the grassroots level and constantly involved in producer communications activities, QSBCs are encouraged to provide positive and negative feedback to the Beef Board regarding producers' attitudes of the nation-wide checkoff program, industry needs and priorities.

Input:

- QSBCs are kept informed about Beef Board activities, plans and issues, in order that they may provide input responding to concerns and attitudes expressed by grassroots producers, and assist the Beef Board in achieving industry consensus.

PLAINTIFF'S EXHIBIT 82

Budget Development and Approval Process

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Process for Annual Budgets and Budget Amendments

1. Strategic priorities are developed and ranked by committee, then ranked across committees by committee and group chairs and vice-chairs in accordance with the Long-Range Plan. *(Jan. – Mar.)*

2. The Joint Industry Budget Committee meets with the group chairs and vice-chairs to develop a budget recommendation based on strategic priorities. NCBA's total budget takes into account CBB's projected revenues, SBC investments, dues and other non-checkoff funding sources. The NCBA Board of Directors reviews and approves the final industry budget recommendation at its summer meeting. Budget amendments are approved at the annual meeting. *(April – July)*

3. The recommended CBB budget is sent to the Operating Committee (OC) for approval. After approval by the OC, the CBB budget recommendation is sent to the full Beef Board for approval. Finally, the CBB budget must also be approved by USDA. *(April – July)*

4. The OC uses the approved budget to fund authorization requests (projects). If the budget is not approved, then the budget process starts again with the Joint Industry Budget Committee. *(July – Sept.)*

5. CBB's annual budget allocates CBB's projected revenues and is presented to CBB for approval at the summer meeting. Any revenue surplus at the end of the fiscal year is added to the amount by which actual administrative expenses and completed project expenses were below budget. The resulting amount is then available for a budget amendment to be considered at the winter meeting. *(Sept. – Jan.)*

Process for "Dynamic" Budget Amendments (used to reallocate FROE funds)

1. As projects are completed, Final Reports of Expenditure (FROEs) are filed with CBB. Any funds left unspent from projects completed under budget (FROE funds) are moved to CBB's unappropriated fund balance. Rather than wait until year end to put those funds to work, the Joint Industry Budget Committee determines that amounts in the unappropriated fund balance should be allocated to budget components to better address current strategic priorities.

2. The Joint Industry Budget Committee develops a proposed budget amendment that allocates funds to CBB budget components.

3. The OC is asked to approve the recommended budget amendment. This can be accomplished at a regularly scheduled meeting or via conference call.

4. The OC approved budget recommendation is sent to all CBB members for approval via mail ballot.

5. The OC may approve projects based on the amended budget.

Variation: If funds need to be allocated immediately to fund time critical projects, the OC can approve the budget amendment (step 3) and approve projects for funding (step 5) contingent upon subsequent approval of the proposed budget amendment by CBB and USDA.

Approved 3-18-98

Annual Beef Industry Planning Cycle



FIDUCIARY RESPONSIBILITIES

Beef Board members occupy a position of trust and confidence. As a result, they have a "fiduciary" relationship to the Beef Board.

- A "fiduciary" is a person who is required to act in scrupulously good faith, and primarily in the interest of another.

- Members of the Beef Board must act primarily in the general interests of the beef industry and not in his/her own interest or that of industry segments.

When a member has personal interest - - - financial or otherwise - - - in a matter being considered by the Board, most state laws require that he/she may not vote on the question. Even if a Board member is legally permitted to vote in such a situation, it is usually sensible for him/her to abstain, so that actions of the Board cannot be tainted by the appearances of impropriety or self-interest.

So long as the members conduct the business of the Beef Board in accordance with their fiduciary responsibilities, they remain free from personal liability, even if the Beef Board incurs financial or other harm through their poor judgment.

Members who exercise honest discretion with no showing of any conflict of interest, and within the powers of the Board, are protected from liability under the so-called "business judgment rule." However, if members commit acts of dishonesty or willful misconduct with the result that the Board suffers a loss, they can be held personally liable. They are bound to care for Board property and conduct and manage its affairs in good faith, and for a violation of these duties, resulting in waste or loss of Board assets, they will be held accountable.

FIDUCIARY RESPONSIBILITY AND LIABILITY OF BOARD MEMBERS

The Beef Board operates through the direction of Board members. The role of a Beef Board member encompasses several important powers and responsibilities.

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The primary responsibility of Board members is to guide the planning and budgeting, implementation and evaluation of checkoff programs. Conduct of programs and investments of checkoff dollars are controlled through the actions of Board members.

Powers of the Board are set forth in the Beef Promotion and Research Act and Board members are responsible for carrying out the intent of Congress established in the Act. Therefore, responsibilities of Board members cannot be treated casually. Members must conscientiously use their powers in good faith to benefit general interests of the beef industry, and not merely for the interests of industry segments or a few Board members.

The role of a Board member is more than merely an honorary position. The law requires active involvement and participation of Board members in the life and decision-making process of the organization. Anything less fails to properly serve the Beef Board, but can also leave the Board member exposed to potentially significant personal liability and public embarrassment.

Source: Wayne Watkinson – Legal Counsel

PLAINTIFF'S EXHIBIT 83

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENER-DEFENDANTS.

DECLARATION OF BARRY CARPENTER

I, Barry Carpenter, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am Deputy Administrator of the Livestock and Seed Program of the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA"). I have worked for the USDA since 1970 and have held my current position since 1993.

3. My duties include implementation of the Beef Promotion and Research Act ("Act") and the Beef Pro-

motion and Research Order ("Order"), and oversight of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board"). I am also familiar with many of the other commodity promotion orders implemented by USDA, especially those relating to soybeans and pork.

4. USDA, acting through AMS, exercises careful oversight over all funds spent by the Beef Board. This oversight includes final approval authority over every checkoff dollar spent by the Board, as well as active participation in the developmental process of all the Board's checkoff-funded advertising, promotion, research, consumer information, and industry information projects. I am the individual responsible for oversight of, as well as for the supervision of other AMS employees who oversee, all actions and decisions made by the Beef Board pursuant to the Secretary's delegation of authority. *See* 7 C.F.R. § 2.79(a)(8)(xxxii); 57 Fed. Reg. 20 (Jan. 23, 1992).

5. All checkoff-funded Beef Board projects and the full Beef Board budget undergo a lengthy developmental process before the Board submits them to USDA for final approval. USDA officials provide input and advice at every stage of project and budget development–from gemination to final approval.

6. Many ideas for promotional projects are first aired at Advisory Committee meetings, which are held twice a year, are open to the public (as are all of the meetings described below), and are attended by members of the Beef Board and members of the Federation of Qualified State Beef Councils ("Federation"). These meetings are run by statutorily - prescribed industry contractors, with whom the Beef Board contracts to develop and implement checkoff-funded projects, and

are designed to solicit public input on funding priorities and program goals. The Advisory Committee also recommends budgetary priorities for the Beef Board.

7. Ralph Tapp, Chief, Marketing Program Branch, Livestock and Seed Program, AMS, and/or I attend all Advisory Committee meetings, stopping in on the various simultaneous sessions being held. We participate actively in these meetings.

8. Based in part on the priorities and ideas solicited at Advisory Committee meetings, industry contractors formulate proposed checkoff-funded projects, including advertising, promotion, research, consumer information, and industry information projects. Working with Beef Board guidance, the contractors prepare formal Authorization Requests ("ARs"), which document planned projects and their budgets, for submission to the Beef Promotion Operating Committee ("Operating Committee").

9. The Operating Committee, which consists of ten members of the Beef Board and ten elected members of the board of directors of a qualified state beef council, meets several times each year. It generates and approves annual budget recommendations for the Beef Board and reviews each submitted AR. The Operating Committee must approve the Board's annual budget recommendation and each AR, by a two-thirds vote of its members, before they are submitted to the Beef Board and USDA for further review and approval.

10. Mr. Tapp and/or I attend all Operating Committee meetings as active participants. Mr. Tapp and I review proposed annual budgets and ARs before attending, and provide comments and feedback to

members of the Operating Committee on the proposals and on any other issues that arise.

11. If approved by the Operating Committee, the annual Beef Board budget is submitted to the full Beef Board for review and approval by a majority vote.

12. Mr. Tapp and/or I also attend all full Beef Board meetings, which are held twice each year.

13. ARs approved by the Operating Committee are submitted to the Beef Board Executive Committee ("Executive Committee") for review and ratification. The Executive Committee oversees the day-to-day operations of the Board and implements its policies.

14. Mr. Tapp and/or I attend these meetings and actively participate in all discussions, providing comments and feedback to members of the Executive Committee on proposed ARs and general budget and program direction goals.

15. Once the full Beef Board approves its annual budget, and the Executive Committee ratifies an AR, each is submitted to USDA for final approval. Mr. Tapp and members of his staff in the AMS Marketing Program Branch first review the final proposed budget or project for compliance with the Act and Order. If problems are identified at this stage, Marketing Program Branch staff work with the Beef Board to make any necessary changes. The annual budget or AR will not be approved until the changes are made.

16. Once the AMS Marketing Program Branch reviews and approves the Beef Board's annual budget or AR, it is sent to me for final approval. I raise any and all remaining concerns I have about the budget or a specific project with the Beef Board at this time and

will not approve them until all necessary changes are made.

17. While USDA does not hesitate to exercise its veto authority when materials and budgets are sent for final approval, it is rare for problems to remain at that stage. This is because of the extensive input Mr. Tapp and I have in all budgetary and product development at each stage of review, as well as the open lines of communication we maintain between Beef Board and USDA staff.

18. In addition to approving project proposals via the AR review process, USDA requires the Beef Board to submit all of its checkoff-funded advertising and promotional materials for AMS review and approval prior to their implementation. The Beef Board often consults with AMS as to the propriety of a particular proposed advertisement during the drafting stage, as well. A true and accurate copy of one instance in which USDA mandated a change in a proposed advertisement is attached hereto as Exhibit 1.

19. USDA also requires the Beef Board to submit all of its producer communication materials for AMS review and approval prior to their implementation. In addition, the Beef Board often consults with AMS as to the propriety of a particular proposed communication during the drafting stage. A true and accurate copy of one instance in which USDA mandated a change in a proposed producer communication is attached hereto as Exhibit 2. The change was intended to ensure that the communication avoided the implication that the checkoff can guarantee profits by changing the phrase "means increasing profits" to "can mean increased profits."

20. USDA requires that the Beef Board oversee all checkoff spending by qualified state beef councils. Pursuant to its oversight function, the Beef Board requires that each qualified state beef council submit its marketing plan and budget to the Board prior to each fiscal year for review and approval and that each state council submit an audited review at the end of each fiscal year. The Beef Board raises any concerns it has upon review of the material with AMS.

21. USDA reviews all qualified state beef council checkoff-funded advertising and promotional materials for branded products prior to their publication. If a problem with an advertisement or communication is identified, USDA does not approve the material until necessary changes are made.

22. USDA reviews other checkoff-funded promotional materials prepared or funded by qualified state beef councils on a post-release basis. If a problem with an advertisement or communication is identified, USDA orders it withdrawn from publication until necessary changes are made.

23. USDA reviews every contract the Operating Committee or Beef Board enters into for checkoff-funded services before it is signed and randomly spot checks subcontracts entered into by Beef Board contractors for checkoff-funded services. USDA rejects any contractor or proposed contract that fails to meet criteria as established in the Act.

24. USDA pre-approves any testimony provided to or appearances made by Beef Board employees or members before Congress on behalf of the Beef Board.

25. USDA also participates in an advisory capacity in the Board's hiring decisions and maintains final

approval authority for the selected candidate for the Beef Board's Chief Operating Officer.

26. In addition to the continuous oversight described above, USDA determines the composition of the Beef Board itself. USDA certifies those organizations that are eligible to nominate Beef Board members, based on the requirements set forth in the Act. In exercise of this authority, USDA has rejected the applications of organizations that do not meet the statutory criteria, and has in the past decertified at least one such organization that had previously been certified.

27. USDA requires these organizations to submit at least two nominees for each open seat on the Beef Board, and often receives more than two nominees.

28. Pursuant to its statutory authority, USDA has removed a member of the Beef Board in the past by seeking and accepting that person's resignation.

29. All checkoff assessments paid by importers are collected by the U.S. Customs Service ("Customs Service"), which provides them to USDA. USDA, in turn, provides these funds to the Beef Board.

30. On average, graded beef sells for approximately an additional $15 per hundredweight compared to ungraded beef. *See* National Weekly Direct Slaughter Cattle—Premiums and Discounts Report, *<http://www.ams.usda.gov/mnreports/lm_ct155.txt>*. Grading effectively sets the price of livestock sold, as most livestock prices are based either on the actual grade of the meat, or the anticipated grade at the time of sale.

31. Mandatory price reporting under the Livestock Mandatory Reporting Act of 1999 also serves to effectively establish livestock prices in the marketplace as many sale contracts are tied to the reported prices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of October, 2001.

/s/ BARRY L. CARPENTER
BARRY L. CARPENTER

USDA

United States Department of Agriculture | Agricultural Marketing Service | P.O. Box 96456 Washington, DC 20090-6456

June 4, 1997

Mr. Monte Reese
Chief Executive Officer
Cattlemen's Beef Promotion
and Research Board
Post Office Box 3316
Englewood, Colorado 80155

Dear Monte:

We have reviewed and are approving the proposed TV advertisement entitled "Cindy" depicting a dream-like scene in which a rotisserie chicken expresses a desire to be a steak. We also reviewed the proposed radio advertisement entitled "Tastes Like Chicken" which we are not approving as submitted.

Sincerely,

/s/ Robert L. Leverette
(for) Barry L. Carpenter
Director
Livestock and Seed Division

USDA FAXED

United States Department of Agriculture

Producer Communications

Cattlemen's Beef Promotion and Research Board

SUBJECT: Five Radio Scripts—State Beef Councils

Date Received: 12/10/99 Time: 5:25 p.m.

Date Approved: 12/13/99 Time: 2 p.m.

Ralph L. Tapp notified Board's contact Sharyl Phipps, NCBA by:

___ Phone _X_ Fax ___ e-mail

We Disapproved: _/_/_ Time: ____

_____ notified Board's contact _____ by:

___ Phone ___ Fax ___ e-mail

Date Advised Board More Time Needed: _/_/_ Time: __

_____ notified Board's contact _____ by:

___ Phone ___ Fax ___ e-mail

NOTES: As discussed modify #5 to avoid implying that the checkoff can "guarantee" profits by replacing "means increasing profits" with something like: "can mean increased profit

Reviewed and Approved by: Ralph L. Tapp

Date: 12/13/99

ANIMALS BROUGHT TO YOU BY THE NEBRASKA BEEF PRODUCERS THROUGH THEIR BEEF CHECK-OFF.

RADIO RELEASE #5
INTERNATIONAL MARKETING
30 SECONDS

I'M (NAME), A (TYPE OF OPERATION) FROM (HOMETOWN), DID YOU KNOW THAT OUR CHECK-OFF DOLLARS ARE HELPING PROMOTE U.S BEEF EXPORTS IN MORE THAN 50 FOREIGN COUNTRIES? LAST YEAR FOR THE FIRST TIME EVER MORE THAN 1 MILLION METRIC TONS OF U.S. BEEF WAS EXPORTED. THAT'S FOUR TIMES MORE THAN WHEN THE CHECKOFF BEGAN IN 1986. INCREASED EXPORTS EQUALS MORE DEMAND. AND THAT ~~MEANS INCREASING~~ CAN MEAN INCREASED PROFITS FOR U.S. PRODUCERS. BROUGHT TO YOU BY THE NEBRASKA BEEF PRODUCERS AND THEIR BEEF CHECKOFF.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS

SECOND SUPPLEMENTAL DECLARATION OF BARRY CARPENTER

I, Barry Carpenter, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am Deputy Administrator of the Livestock and Seed Program of the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA" or "Department"). I have worked for the USDA since 1970 and have held my current position since 1993.

3. My duties include implementation of the Beef Promotion and Research Act ("Act") and the Beef Promotion and Research Order ("Order"), and oversight of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board"). I am also familiar with many of the other commodity promotion orders implemented by USDA, especially those relating to soybeans and pork.

4. I have reviewed Plaintiff's Response to Defendants' Statement of Material Facts ("Plaintiffs' Response"), wherein Plaintiffs dispute that AMS exercises careful oversight over the Beef Board's activities and expenditures and that Ralph Tabb and/or I, on behalf of AMS, actively participate in the developmental process for all of the Board's checkoff-funded projects. I am providing this Second Supplemental Declaration to further describe the nature and extent of USDA's oversight over the Beef Board, as well as other relevant facts.

5. I, or someone I designate, participate in an orientation session for all new Beef Board members each year. At this orientation, I explain the Beef Board members' responsibilities, the Department's oversight and approval role, the regulations that govern the Board's operation and that those regulations can only be changed pursuant to notice and comment. In the future, I will also be conducting such an orientation session for new Operating Committee members.

6. In addition, I am regularly-scheduled speaker at each full Beef Board meeting. I use this opportunity to remind Beef Board members of their fiduciary obligations under the Act and Order and to provide USDA's input regarding whatever matters I deem appropriate.

7. I have reviewed the minutes of various Beef Board committee meetings attached as Exhibit 69 to Plaintiffs' Response, and am generally familiar with the nature of Beef Board minutes. The minutes attached as Exhibit 69 to Plaintiffs' Response, like other Beef Board committee minutes generally, do not record specific comments made by those in attendance with regard to particular agenda items, but rather merely record actions taken at the meeting. Thus, the minutes describe the topic discussed and then indicate "discussion" when a discussion was held. *See, e.g.*, Minutes of Executive Committee Meeting, Aug. 2, 2000, at 3, attached as part of Exhibit 69 to Plaintiffs' Response.

8. I do, in fact, actively participate in those meetings that I attend. That participation takes various forms.

9. I prepare for the meetings by reviewing any material that is provided in advance of the meetings. If I identify any issue that raises serious concern, I will phone the relevant individual to raise and discuss my concern. I usually call the Board's Chief Operating Officer or Chairman in such circumstances.

10. At the various meetings I attend, I listen carefully to the discussion and I speak when I deem it necessary. For example, I estimate that at the last Executive Committee meeting I attended I spoke approximately half-a-dozen times.

11. I also often raise my concerns with Committee Members during breaks in the meetings. In this way, my concerns are often aired at the meetings by others, without my having to directly address an issue while the meeting is in session. If an issue about which I have a concern is raised by others, and the discussion and

decision regarding that issue are satisfactory to me, I do not feel the need to further raise the issue, and I therefore remain silent on the matter. My subordinate, Ralph Tapp, operates in a similar manner.

12. I generally express my views, either before or during a meeting, when a proposed course of action raises concerns with respect to the Act or the Order. I act to ensure that all of the Board's activities are in accordance with the Act and the Order. For example, several years ago a proposed Authorization Request ("AR") for a checkoff-funded producer communication piece, as proposed, included non-checkoff-funded, NCBA activities in its description of Beef Board accomplishments. Upon seeing this, I ensured that proposed piece did not reference any non-checkoff-funded activities even before the AR reached the Operating Committee.

13. The above example also demonstrates how my involvement is often behind the scenes and is not limited to participating in the Board's various meetings. As a result of AMS' persistent involvement in the process, many potentially problematic issues never arise in committee meetings.

14. I also express my views when a matter relates more specifically to the interests of the Department. Thus, for example, I have encouraged the Board —through my participation in various committees and my discussions with Board personnel—to:

a. fund food safety research relating to BSE ("mad cow" disease), because these were areas of food safety research that the Department was concerned about;

b. fund projects regarding "traceability"—the ability to preserve the identity of meat from calf to plate—because the Department was interested in encouraging such research;

c. fund consumer information projects regarding safe food handling procedures because of the Department's interest in the broad dissemination of such information in light of concerns raised by E.coli 0157:H7; and

d. continue to provide extensive funding for the Meat Export Federation's promotion of U.S. beef abroad, and particularly in Japan, because the Department has strong interest in expending export markets for U.S. beef and other commodities.

15. I also let the Board know when I believe the Board's processes need improvement. For example, I recently voiced concern that the AR review and approval process might appear to outsiders to be insufficiently competitive, in light of the Operating Committee's approval of most submitted AR's. While I know from my participation in the process that each AR is assessed, discussed and debated, I believed that outsiders might perceive the process as less thorough than it was. As a result of my comments, Beef Board Chairman Dan Hammond convened a Commission to address this issue and recommend improvements to the AR review and approval process. *See* Exhibit 1 hereto (referencing my concerns and the Commission established).

16. The above example also demonstrates why AMS rarely has to invoke its ultimate authority to direct or prohibit the Beef Board from acting. As a general

matter, the suggestions that I make are accepted and acted upon to my satisfaction, without my having to invoke any regulatory authority.

17. In participating in Operating Committee and other Beef Board meetings, I am aware of my ultimate authority and responsibility to approve all Beef Board projects and expenditures. In order to preserve this authority, and the ability to more thoroughly review any matters agreed upon by the Operating Committee or other Beef Board committees, I restrain my participation in these meetings, so that committee members do not have the impression that by virtue of my participation the Department has somehow pre-judged and approved the actions taken.

18. I also regularly participate in international meetings and conferences in my official capacity.

19. Through my involvement in these activities, I am aware that USDA beef graders are internationally recognized and that "choice" and "prime" grades are the most recognized marks of quality beef in the world.

20. Japanese purchasers, who are the largest importers of American beef, generally require beef to be graded "prime," "choice," or "select." Similarly, in Central and Eastern Europe, the American Beef Club project, funded in part by checkoff dollars, requires participating restaurants to use U.S. "prime" and "choice" beef, and has led to increased demand for U.S. beef in those regions.

21. The American grading system is so widely recognized, and provides American graded beef such a competitive advantage, that other countries model their grading systems on the American model. For example, Canada recently changed its grading system and grade

names to mimic the American system. Similarly, China recently selected the American system as a model in developing its beef grading system.

22. The effect of this widespread recognition of American grades is to increase demand for American beef in the international marketplace, thereby increasing value to U.S. producers and creating additional incentives for American producers to have their meat graded.

23. In my official capacity, I am also in charge of the Department's purchase of certain surplus foods under its Section 32 authority (7 U.S.C. § 612c). These surplus purchases are used in federal feeding programs, primarily the school lunch program. The purpose of such purchases is to maintain a stable market in agricultural commodities.

24. Beef forms a substantial part of the Department's surplus foods purchases. During school year 2000-2001, the Department purchased 122.90 million pounds of beef with a value of $182.32 million. During the same year, the Department purchased 5.76 million pounds of canned beef with a value of $7.89 million and 9.72 million pounds of canned beef stew with a value of $7.49 million. Summaries for these purchases and for prior years can be found at <http://www.ams.usda.gov/lsg/cp/beef/beeffyp.htm>.

25. AMS is also responsible for overseeing the Livestock Mandatory Price Reporting System established pursuant to the Livestock Mandatory Reporting Act of 1999 ("LMRA"), 7 U.S.C. §§ 1635-1636h. As stated in my prior declaration, mandatory price reporting under the LMRA serves to effectively establish livestock prices in the marketplace as many sale contracts are

tied to the reported prices. As further indication of the effect that LMRA-mandated reporting has on the marketplace, USDA has estimated that erroneous price reporting over a 29-day period in April-May 2001 resulted in $15 million to $25 million in lost sale revenue to cattle producers. LMPR Review Team, Livestock Mandatory Price Reporting System: Report to the Secretary of Agriculture, July 2, 2001, at iii, 37, available at <http://www.usda.gov/oce/mp-report/mpr-report.pdf>, attached hereto as Exhibit 2. The importance of such price reporting to the beef and cattle market is further indicated by the fact that the Chicago Mercantile Exchange relies on USDA's price reports to adjust the value of cattle which do not meet contract specifications. See id. at 26.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of December, 2001.

/s/ BARRY L. CARPENTER
BARRY CARPENTER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS.

DECLARATION OF MONTE REESE

I, Monte Reese, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Operating Officer ("C.O.O.") of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board"). I have been employed by the Board since November 1989, and have been C.O.O. or in a comparable position since August 1990. I am in charge of the Board's day-to-day operations. In this position, I work closely with the Agricultural Marketing Service ("AMS") of the U.S. Department of

Agriculture ("USDA"), which exercises continuing oversight over all activities of and spending by the Beef Board.

3. The Board is responsible for overseeing the implementation of the Beef Promotion and Research Act ("Act"). The Board is funded wholly through assessments on the sale and importation of cattle.

4. In fiscal year ("FY") 2000, over $87 million of assessments were collected under the Act.

5. The Board, in conjunction with the Beef Promotion Operating Committee, develops and implements promotion, research, consumer information and industry information plans and projects, all subject to the approval of the Secretary of Agriculture. Some of these projects include the promotion of beef through advertising (including the "Beef, It's What's For Dinner" campaign); food safety programs that conduct research on, an disseminate information about, foodbourne pathogens such as *E. Coli*, Salmonella, and Listeria, as well as the proper handling of beef products; nutrition and health education programs, which provide thousands of children and adults with information regarding dietary needs and the role of beef in a healthy diet; the provision of information regarding BSE ("mad cow disease") and Foot and Mouth Disease; and a host of other activities. Examples of some of these materials are attached as exhibits A through D to the Joint Statement of Stipulated Facts, submitted herewith.

6. The Board's total expenditures on food safety programs since 1987 have exceeded $8 million, and the total expenditures on nutrition and health education have exceeded $24 million.

7. The Board reviews all subcontracts that its contractors enter into for checkoff-funded services, before they do so, and refers questions to USDA as necessary.

8. Although qualified state beef councils are entitled to retain 50 cents of every dollar collected in assessments, many state councils in fact contribute significant portions of that money to support the national program. In FY 2000, the qualified state beef councils provided $13,650,351, or 35 percent of their portion of the assessments, for this purpose. Five states do not have qualified state beef councils, and in those states the Board collects the entire assessments.

9. The Beef Board oversees all checkoff spending by qualified state beef councils. Pursuant to its oversight function, the Board requires that each qualified state beef council submit its marketing plan and budget to the Board prior to each fiscal year for review and approval and that each state council submit an audited review at the end of each fiscal year. These materials are passed on to USDA at its request and are discussed at Beef Board Executive Committee meetings, which are attended by a USDA representative, usually either Barry Carpenter, Deputy Administrator, Livestock and Seed Program, AMS, or Ralph Tapp, Chief, Marketing Programs Branch, Livestock and Seed Program, AMS.

10. USDA regularly forwards to the Beef Board requests for information it receives from members of the public, pursuant to the Freedom of Information Act, 5 U.S.C. § 522. The Board has received and processed at least forty such requests for information from the Livestock Marketing Association (LMA), and, pursuant to its statutory duty, has searched its files and produced all non-exempt, responsive records to LMA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of October, 2001.

/s/ MONTE REESE
MONTE REESE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS.

SUPPLEMENTAL DECLARATION OF MONTE REESE

I, Monte Reese, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Operating Officer of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board") and work closely with the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA"), which exercises continuing oversight over all activities of and spending by the Beef Board.

3. While the Board's domestic promotion programs make no distinction between domestic and imported beef, the Board has never specifically promoted imported beef as indistinguishable from domestic beef. The Board's foreign marketing projects emphasize and promote the safety and wholesomeness of U.S. beef.

4. To the best of my recollection, none of the plaintiffs, and no representative or member of the Livestock Marketing Association ("LMA") or the Western Organization of Resource Councils ("WORC"), has ever complained to the Beef Board about the Board's alleged failure to promote U.S. beef as healthier, tastier, or of higher quality than imported beef, or has ever asked the Board to convey such a message.

5. Some of the Board's programs of promotion, research, consumer information or industry information are supplemented with appropriated government funds.

6. The National Cattlemen's Beef Association ("NCBA"), through its Federation Division, is one of several "established national non-profit industry-governed organization[s]," 7 U.S.C. § 2904(6), with whom the Board has contracted for checkoff-funded services. In recent years, other contractors have included the U.S. Meat Export Federation and the American National Cattlewomen. While NCBA recently has been the Board's Promotion Operating Committee and Beef Board for review. The Board in no way dictates or controls the number of proposals each industry-governed organization may submit.

7. While the relationship between the Beef Board and NCBA has resulted in some confusion, I have not and would not characterize such confusion as "sub-

stantial." Some of the alleged "confusion" was caused by an LMA board member who persisted in referring to Beef Board members as NCBA spokespersons, notwithstanding numerous attempts on the Beef Board's part to rectify this misinformation.

8. Because all initial ideas and decisions about how the Beef Board spends checkoff funds are made by cattle producers, through the lengthy development and approval process explained in Barry Carpenter's declaration of October 18, 2001, I consider the program to be "producer-led." For example, no decision of the Beef Board is implemented without first being approved by cattle producers. I do not believe that this characterization is in any way inconsistent with the extensive oversight USDA provides over all Beef Board activities and spending.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of November 2001.

/s/ MONTE REESE
MONTE REESE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DISTRICT

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

AND

NEBRASKA CATTLEMEN'S INC., ET AL.,
INTERVENOR-DEFENDANTS.

SECOND SUPPLEMENTAL DECLARATION OF MONTE REESE

I, Monte Reese, hereby make the following declaration with respect to the above-captioned matter:

1. I am providing this declaration based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Operating Officer of the Cattlemen's Beef Promotion and Research Board ("Beef Board" or "Board") and work closely with the Agricultural Marketing Service ("AMS") of the U.S. Department of Agriculture ("USDA"), which exercises careful and continuing oversight over all activities of and spending by the Beef Board.

3. I have reviewed Plaintiffs' Response to Defendants' Statement of Material Facts ("Plaintiffs' Response"), wherein Plaintiffs dispute that AMS exercises careful oversight over the Beef Board's activities and expenditures and that Ralph Tapp and/or Barry Carpenter, on behalf of AMS, actively participate in the development process for all of the Board's checkoff-funded projects. I am providing this Second Supplemental Declaration to further describe the nature and extent of USDA oversight over the Beef Board, as well as other relevant facts.

4. USDA has final approval authority over every checkoff dollar spent by the Board, and it plays a constant role in the developmental process of all of the Board's checkoff-funded advertising, promotion, research, consumer information, industry information, and producer communication projects.

5. All checkoff-funded Beef Board projects and the full Beef Board budget undergo a lengthy developmental process before the Board submits them to USDA for final approval. USDA officials provide input and advice at every stage of project and budget development–from germination to final approval.

6. Many ideas for promotional projects are first aired at Advisory Committee meetings, which are held at least twice a year, are open to the public (as are all of the meetings described below), and are attended by members of the Beef Board and members of the Federation of Qualified State Beef Councils ("Federation"). These meetings are also attended by statutorily-prescribed industry contractors with whom the Beef Board contracts to develop and implement checkoff-funded projects. The meetings are designed to solicit public input on funding priorities and program goals.

Based on the information they gather, the Advisory Committee recommends budgetary priorities for the Beef Board.

7. Barry Carpenter and/or Ralph Tapp attend Advisory Committee meetings, stopping in on the various sessions that are held. I have personally observed them at these meetings and have seen them interact with members of the Committee, both in the meetings and outside of them. I always speak to Mr. Carpenter and/or Mr. Tapp at these meetings, and when I do, they freely share USDA's positions and guidance on issues affecting the Beef Board and check-off funds.

8. Based in part on the priorities and ideas solicited at Advisory Committee meetings, industry contractors formulate proposed checkoff-funded projects, including advertising, promotion, research, consumer information, and industry information projects. Working with Beef Board guidance, the contractors prepare formal Authorization Requests ("ARs"), which document planned projects and their budgets, for submission to the Beef Promotion Operating Committee ("Operating Committee").

9. The Operating Committee, which consists of ten members of the Beef Board and ten elected members of the board of directors of a qualified state beef council, meets several times each year. It generates and approves annual budget recommendations for the Beef Board and reviews each submitted AR. The Operating Committee must approve the Board's annual budget recommendation and each AR, by a two-thirds vote of its members, before they are submitted to the Beef Board and USDA for further review and approval.

10. Mr. Carpenter and/or Mr. Tapp attend all Operating Committee meetings as active participants. Since I started at the Beef Board, I have attended every Operating Committee meeting and have witnessed both men provide comments and feedback to members of the Committee when they deem such comments necessary, both in the formal meetings and outside of them. I always speak to Mr. Carpenter and/or Mr. Tapp at these meetings, and when I do, they freely share USDA's positions and guidance on issues affecting the Beef Board and check-off funds.

11. I am familiar with the minutes kept at Operating Committee meetings. Those minutes reflect actions taken by the Committee at those meetings, not comments made by any individual participant. As a result, neither Mr. Carpenter's nor Mr. Tapp's comments would be reflected therein. Attached is a copy of the rules governing Operating Committee meetings, in which Paragraph 14 indicates that "Minutes . . . should contain only what was done, not what was said by the members." Attached at Tab 1.

12. If approved by the Operating Committee, the annual Beef Board budget is submitted to the full Beef Board for review and approval by a majority vote.

13. Mr. Carpenter and/or Mr. Tapp attend all full Beef Board meetings, which are held twice each year. At these meetings, Mr. Carpenter, and in his absence, Mr. Tapp are always given the opportunity to speak from the podium to the full Beef Board on issues of their choosing. In addition, Mr. Carpenter and Mr. Tapp circulate freely, speaking with Beef Board members both in and out of meetings. Again, I speak often with them at these meetings, and they freely

share USDA's positions and guidance on various policy and budgetary issues.

14. I am familiar with the minutes kept at full Beef Board meetings. Those minutes reflect actions taken by the full Board at those meetings, not comments made by any individual participant. This practice is pursuant to Robert's Rules of Order, which the full Beef Board meetings follow, and which specify that minutes "should contain mainly a record of what was *done* at the meeting, not what was *said* by the members" (emphasis in original). The SCOTT, FORESMAN ROBERT'S RULES OF ORDER, (newly revised), § 47, attached hereto at Tab 2. As a result, neither Mr. Carpenter's nor Mr. Tapp's comments would be reflected therein.

15. ARs approved by the Operating Committee are submitted to the Beef Board Executive Committee ("Executive Committee") for review and ratification. The Executive Committee oversees the day-to-day operations of the Board and implements its policies.

16. Mr. Carpenter and/or Mr. Tapp attend these meetings and actively participate in all discussions, providing comments and feedback to members of the Executive Committee on proposed ARs and general budget and program direction goals. I also attend these meetings and personally have witnessed the participation of these two men, both in and out of committee meetings. As with the other meetings they attend, they share with the committee as a whole and with individual members USDA's positions and guidance on checkoff-funded activities and issues.

17. I am familiar with the minutes kept at Executive Committee meetings. Those minutes reflect actions

taken by the Committee at those meetings, not comments made by any individual participant. This practice is pursuant to Robert's Rules of Order, which the Executive Committee meetings follow, and which specify that minutes "should contain mainly a record of what was *done* at the meeting, not what was *said* by the members") (emphasis in original). See Tab 2. As a result, neither Mr. Carpenter's nor Mr. Tapp's comments would be reflected therein.

18. Once the full Beef Board approves its annual budget, or the Executive Committee ratifies an AR, the budget or AR is submitted to USDA for final approval. At this stage, Mr. Tapp and/or Mr. Carpenter may call me at express any remaining concerns they have about the proposed budget or project. All changes they request are made, so that USDA approval may be obtained.

19. The lines of communication between the Beef Board and USDA are wide open, and I speak with AMS regularly both at meetings and during the ordinary course of business. It is not unusual for Mr. Carpenter and/or Mr. Tapp and I to speak several times a day, although at times we may also go a few weeks without connecting by telephone.

20. In addition to providing their usual oversight and advisory functions, AMS officials inform the Board if USDA has a particular policy position that the Board should address. Recent examples of such positions that come to mind include requests for:

a. additional funding for food safety research and industry and consumer information relating to BSE ("mad cow" disease);

b. additional funding for consumer information projects regarding safe food handling procedures, in light of concerns raised by the presence of E.coli 0157:H7 in certain beef products; and

c. additional and extensive funding for the Meat Export Federation's promotion of U.S. beef abroad, and particularly in Japan.

21. Further, the Beef Board regularly corresponds with AMS outside the official approval process in an effort to flag future issues and to ensure that a future request for approval will be granted. An example of such correspondence is attached hereto, at Tab 3. In this instance, I wanted USDA's preliminary approval of the steps the Board would take to ensure the resumption of beef checkoff funding for U.S. Meat Export Federation projects.

22. In addition to approving project proposals via the AR review process, USDA requires that the Beef Board submit all of its checkoff-funded advertising and promotional materials for review and approval prior to implementation. The Beef Board raises with USDA any questions we have about the propriety of a particular proposed advertisement during the drafting stage, as well.

23. USDA also requires the Beef Board to submit all of its producer communication materials for AMS review and approval prior to their implementation. Prior to submission, the Beef Board often consults with AMS as to the propriety of a particular proposed communication during the drafting stage.

24. The Beef Board submits every contract the Operating Committee or Beef Board enters into for checkoff-funded services for review and final approval by USDA. USDA also randomly spot checks subcontracts entered into by Beef Board contractors for checkoff-funded services.

25. No member or employee testifies before Congress on behalf of the Board without prior approval by USDA.

26. USDA participates in an advisory capacity in the Board's hiring decisions and maintains final approval authority for the selected candidate for Chief Operating Officer, the position I currently hold.

27. In addition to the continuous oversight described above, USDA determines the composition of the Beef Board itself. USDA certifies those organizations that are eligible to nominate Beef Board members, based on the requirements set forth in the Act. USDA has rejected the applications of organizations that do not meet the statutory criteria and has in the past decertified at least one such organization that had previously been certified.

28. USDA requires these organizations to submit at least two nominees for each open seat on the Beef Board, and it is my understanding that it often receives more than two nominees.

29. Pursuant to its statutory authority, USDA has removed a member of the Beef Board.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of December, 2001.

/s/ MONTE REESE
MONTE REESE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

&

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

June 27, 2001

DEPOSITION OF MONTE REESE

* * * * *

[52]

Q. The ten-day rule. Okay. What was the percentage that the initial referendum—by what percentage did cattle producers approve?

[53]

A. My recollection is it was between 78 and 79 percent.

* * * * *

[Seal]
Office of Chief Counsel

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

February 19, 1993

Mr. M. Bradley Flynn
Office of the General Counsel
United States Department of Agriculture
Room 2014 - South Building
Washington, DC 20250-1400

Dear Mr. Flynn:

This is in reply to your letter dated January 13, 1993, requesting rulings that the Cattlemen's Beef Promotion and Research Board (hereinafter referred to as "the Board") is exempt from federal income taxation.

Revenue Ruling 87-2, 1987-2 Cumulative Bulletin 18, holds that a trust fund created by a state supreme court to hold amounts advanced to lawyers in the state supreme court to hold amounts advanced to lawyers in the state by their clients is an integral part of the state and not subject to income tax. In arriving at this holding, the ruling reasons that the state court's creation of the fund and its ability to select and remove the fund's governing body, to control the fund's investments and expenditures, to monitor the fund's daily operation, and to abolish the fund indicate that the fund is not an independent entity, but rather is an integral part of the state.

In the present situation, the Board is established pursuant to specific statutory authorization vested in the Secretary of Agriculture. Members of the Boards are appointed by the Secretary of Agriculture from nominations submitted by producers and importers. The Boards' budgets, projects, and contracts with other parties must be approved by the Secretary, and the Board must maintain records for the Secretary's inspection. No funds of the Board may be used to influence any legislation. The Secretary is authorized to conduct a referendum upon the satisfaction of certain conditions for the purpose of determining whether to terminate the order establishing the Board.

The Board is similar to the trust fund in Rev. Rul. 87-2 and therefore is an integral part of the Department of Agriculture. Accordingly, the Board is not subject to federal income taxation.

If you require further information or have any questions concerning this matter, please call the undersigned at (202) 622-3930, or Mr. Adrian Michur at (202) 622-3203.

Sincerely yours,

Assistant Chief Counsel
(Financial Institutions & Products)

By: /s/ WILLIAM E. COPPERSMITH
William E. Coppersmith
Chief, Branch 2

Supreme Court, U.S.
FILED
AUG 20 2004
OFFICE OF THE CLERK

(15) (12)

Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX
VOL. 2

PAUL D. CLEMENT*
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

**Counsel of Record*
for Petitioner United States

LORANE F. HEBERT*
Hogan & Hartson LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

**Counsel of Record*
for Petitioner Nebraska Cattlemen

PHILIP C. OLSSON*
Olsson, Frank and Weeda
1400 Sixteenth Street, N.W.
Washington, D.C. 20036-2220
(202) 518-63[illegible]

**Counsel of Record*
for Respondents

PETITION FOR WRIT OF CERTIORARI FILED: FEB. 13, 2004
CERTIORARI GRANTED: MAY 24, 2004

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

&

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

THIRD SUPPLEMENTAL DECLARATION OF BARRY CARPENTER

I, Barry Carpenter, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration in response to the Court's request for documentation regarding the Department of Agriculture's ("Department") exercise of its role in certifying the ten members of the Beef Promotion Operating Committee ("Operating Committee") elected from the boards of directors of the Qualified State Beef Councils. Such authority is exercised pursuant to the requirements of the Beef Promotion and Research Act ("Act"), 7 U.S.C. § 2904(4)(A),

and the Beef Promotion and Research Order ("Order"), 7 C.F.R. § 1260.161(c).

2. This declaration is based on my personal knowledge and information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

3. As set forth in my prior declarations in this case and my testimony at trial, and pursuant to the requirements of the Act and the Order, once the Federation of Qualified State Beef Councils ("Federation") elects its representatives to the Operating Committee, the Department verifies both that: (a) the electees have been duly elected by the Federation as its representatives to the Operating Committee, and (b) each electee is a producer and a member or ex-officio member of the board of directors of a Qualified State Beef Council, as that term is defined in the Act and Order.

4. In addition, the Department conducts internal background checks on each electee to ascertain whether the electees are in good standing with the Department and to determine whether the Department is aware of any information which might impact negatively on the certification of these individuals' election to the Operating Committee. In carrying out this check, the Department's Agricultural Marketing Service refers the electees' names to the following Department agencies: the Farm Services Agency; the Grain Inspection, Packers and Stockyards Administration; the Food Safety Inspection Service; the Rural Business-Cooperative Service; and the Rural Housing Service.

5. Finally, pursuant to the Order, each electee is required to submit a signed Conflict of Interest Statement in which the electee agrees to disclose any re-

lationships that he or she has with any beef promotion entity or any organization that has, or is being considered for a contractual relationship with the Cattlemen's Beef Promotion and Research Board or the Operating Committee.

6. Records reflecting the Federation's confirmation of election, the Department's internal background check, and the Department's certification of electees, as described in paragraphs 3 and 4 above, in each of the years 1997-2001, respectively, are attached hereto as Defendants' Exhibits 247 to 251. (Exhibit 247 covers 1997, exhibit 248 covers 1998, etc).[1]

7. Attached hereto as Exhibit 252 is an example of the conflict of interest statement, described in paragraph 5 above, and signed by each Operating Committee electee from 1997-2001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of January 2002.

/s/ BARRY L. CARPENTER
BARRY CARPENTER

[1] In the interests of the electees' privacy, their Social Security numbers have been redacted from all documents attached hereto.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

&

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

DECLARATION OF THOMAS RAMEY

I, Thomas Ramey, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration in response to the Court's request for documentation regarding the Cattlemen's Beef Promotion and Research Board's ("Beef Board" or Board") budget and investments. This declaration is based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Financial Officer of the Beef Board. In that capacity, I am primarily responsible for

all of the Beef Board's financial and accounting activities, including oversight of the Board's annual budgets and investments pursuant to the Beef Promotion and Research Act ("Act" or "Beef Act") and the Beef Promotion and Research Order ("Order" or "Beef Order").

3. In Fiscal Year 2001, actual checkoff revenues collected pursuant to the Beef Act and Order totaled $86,099,403. *See* Cattlemen's Beef Board, Actual Beef Checkoff Revenues, Fiscal Year 2001, attached hereto as Defendants' Exhibit 255.

4. Of this total, the Beef Board's portion of the assessments totaled $47,469,581, which consists of its portion of the assessments collected in states with QSBCs ($38,629,822), assessments collected in states without QSBCs ($60,907), and assessments collected from importers ($8,778,852). *See* Exh. 255. The Beef Board's total assessment revenue, together with interest income ($1,820,563) and other revenues ($24,383), constitute its total revenue of $49,314,527 for FY 2001. *See* Exh. 255. *See also* Statements of Revenues and Expenses and Changes in Fund Balances, September 30, 2001 and 2000, Annual Report 2001, attached hereto as Defendants' Exhibit 256.

5. In FY 2001, the QSBCs' portion of the collected assessments totaled $38,629,822, which is half of the assessment collected in states with QSBCs. *See* Exh. 255.

6. The Act provides that the Beef Board, with the approval of the Secretary of the United States Department of Agriculture ("USDA"), may invest, pending disbursement, funds collected through assessment only in obligations of the United States or any agency thereof, in general obligations of any State or any

political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States. 7 U.S.C § 2904(9).

7. Pursuant to that policy, the Beef Board invests its funds according to USDA's Agricultural Marketing Services' investment policy. *See* AMS Directive, Investment of Public Funds, attached hereto as Defendants' Exhibit 257. Recent investment funds include the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Bank, Federal Farm Credit Banks, and repurchase agreements at Commerce Bank of Kansas City, N.A., that are fully collateralized by U.S. Government securities. A true and accurate copy of the Beef Board's Daily Investment Report as of December 31, 2001, which reflects these investments, is attached hereto as Exhibit 258.

8. As demonstrated by the Daily Investment Report, the weighted average yield for Beef Board investments, as of December 31, 2001, is 3.049%. *See* Exh. 258. The weighted average yield for each of the prior quarters was as follows: 6.151% as of March 31, 2001; 5.139%, as of June 30, 2001, and 4.022%, as of September 30, 2001. A true and accurate copy of a document I prepared documenting weighted average yield of the Beef Board's investments over the past ten months is attached hereto as Exhibit 259.

9. On April 9, 2001, the Beef Board's members of the Budget Committee projected the Board's interest income for FY 2002, using a 4.5% interest rate, at $985,000. *See* Defendants' Exh. 255, submitted at trial. The average yield on Beef Board investments, as of

March 31, 2001, was 6.151%. *See* Exh. 259. As we did not anticipate such a sharp reduction in short-term interest rates in the latter half of 2001, at the time 4.5% appeared a reasonable interest rate with which to make projections. A true and accurate copy of the calculation used to project that number is attached hereto as Exhibit 260.

10. The majority of the Beef Board's investments are composed of funds committed to projects that have been approved by the Beef Board and USDA, but which have not yet been completed. As expenses are incurred in these projects and the Board receives bills from its contractors, the Board uses invested funds to reimburse its contractors for costs incurred.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23d day of January 2002.

(ILLEGIBLE)
THOMAS RAMEY

STATEMENTS OF ASSETS, LIABILITIES AND FUND BALANCES

(MODIFIED CASH BASIS, NOTE 2) SEPTEMBER 30, 2001 AND 2000

ASSETS	2001	2000
CASH AND CASH EQUIVALENTS (Notes 2 and 3)	$ 663,464	$ 1,926,557
SHORT-TERM INVESTMENT (Note 3)	25,468,729	26,305,128
EQUIPMENT, net of accumulated depreciation of $47,766 and $57,049, respectively (Note 2)	13,552	9,503
OTHER	1,106	1,276
Total assets	$ 26,146,851	$ 28,242,464
LIABILITIES AND FUND BALANCES		
DUE TO STATE BEEF COUNCILS AND OTHER COMMITMENTS (Note 2)	$ 754	$ 944
FUNDS BALANCES (Note 5):		
Appropriated for budgeted expenditures	15,074,044	16,589,509
Board reserve	5,000,000	5,000,000
Unappropriated	6,058,501	6,642,508
Investment in equipment, net	13,552	9,503
	26,146,097	28,241,520
Total liabilities and fund balances	$ 26,146,851	$ 28,242,464

STATEMENTS OF REVENUES AND EXPENSES AND CHANGES IN FUND BALANCES

(MODIFIED CASH BASIS, NOTE 2) SEPTEMBER 30, 2001 AND 2000

REVENUES:	2001	2000
Assessments (Note 1)	$ 47,469,581	$ 48,068,845
Interest	1,820,563	1,607,962
Other	24,383	24,465
Total revenues	49,314,527	49,701,272

EXPENSES:		
Program		
Promotion	29,976,379	29,028,696
Research	5,132,907	4,284,065
Consumer Information	4,868,427	6,809,609
Industry Information	1,706,150	1,948,653
Foreign Marketing	5,064,770	4,801,628
Producer Communications	2,558,901	1,854,930
Program Evaluation	67,441	136,411
Program Development	119,877	84,744
Total Program Expenses	49,494,852	48,948,736
USDA Oversight	169,988	176,502
Administration (Note 4)	1,745,110	1,644,635
Total expenses	51,409,950	50,769,873
Deficiency of revenues over expenses (Note 2)	(2,095,423)	(1,068,601)
BEGINNING FUND BALANCES	28,241,520	29,310,121
ENDING FUND BALANCES	$ 26,146,097	$ 28,241,520

The accompanying notes to financial statements are an integral part of these statements.

Agricultural Marketing Service

DIRECTIVE 2210.2 5/1/98

INVESTMENT OF PUBLIC FUNDS

I. PURPOSE	This Directive states the policy and responsibilities for investment of public funds maintained by the Agricultural Marketing Service (AMS).
II. REPLACEMENT HIGHLIGHTS	This Directive replaces AMS Directive 433.1, Investment of Public Funds, dated 11/30/92.
III. AUTHORITIES	A. Title 31, Code of Federal Regulations (CFR), Parts 202-226, "Money and Finance: Treasury."
	B. Volume I, Treasury Financial Manual 6-9000, "Securing Government Deposits in Federal Agency Accounts."
IV. DEFINITIONS OF TERMS	A. *Agency*—Any Department, Agency, or instrumentality of the U.S. Government.
	B. *Designated Depositary*—A financial institution designated by the Department of the Treasury as a depositary and financial agent of the Federal Government and selected by an agency to hold public funds.

C. *Federal Reserve Bank of the District*—The Federal Reserve bank or branch of the district in the geographic area in which the agency's designated depositary is located.

D. *Government Deposits*—Public money, including, but not limited to, revenue and funds of the United States and deposit funds subject to the control or regulation of the United States or any of its officers, agents, or employees.

E. *Recognized Insurance Coverage*—The insurance provided by the Federal Deposit Insurance Corporation (FDIC), National Credit Union Share Insurance Fund, and the insurance organizations specifically approved by the Secretary of the Treasury under Title 31, CFR, Part 226.

V. POLICY

It is AMS policy to:

A. Exercise prudent cash management of funds collected through fees for services, assessments collected from handlers and producers to finance research and promotion efforts, and assessments collected to administer marketing agreements and orders. This also applies to payments received by producer settlement funds and interest or

other charges collected on overdue accounts.

B. Require that a formal agreement or Memorandum of Understanding be signed between the parties before funds are deposited with a financial institution. This agreement is to state the responsibilities of both the custodial agency and the financial institution, and must conform to the policies and guidelines established by the U.S. Treasury with respect to deposits of, and collateral for, public funds.

C. Require complete safety of invested funds. In this regard, AMS adheres to U.S. Department of the Treasury Regulations, Title 31, CFR, Parts 202-226.

VI. RESPONSIBILITIES

A. In AMS, public funds are maintained by the Budget Office, the Research and Promotion Boards, Milk Market Administrators, and the Fruit and Vegetable Marketing Order Administrative Committees. They are the fund custodians for AMS. When invest ing funds held in public trust, fund custodians must follow these guidelines:

1. Investments. All investments must be short-term, risk-free, interest-bearing instruments.

a. Short-term. All investments must have a maturity period of 1 year of less to ensure availability and rapid conversion of the principal to cash.

b. Risk-Free. All investments must be Federally insured or fully collateralized with Federal Government securities.

2. Insurance Coverage. All investments must be fully secured. Accounts are to be established at financial institutions having FDIC insurance. Accounts at individual institutions should total, in the aggregate, less than $100,000 to ensure full insurance for both principal and interest.

3. Collateralization. All investments exceeding $100,000 with FDIC-insured institutions must be fully collateralized.

a. Before sending funds to any institution for investment, eligible collateral must be pledged to an account under the control of the investing custodian.

b. Only those securities specified in U.S. Department of the Treasury Regulations, Title 31,

CFR, Part 202, are acceptable collateral. They include collateral issued, fully insured or guaranteed by U.S. Government Agencies or U.S. Government sponsored corporations. No declining balance securities, regardless of issue, are acceptable.

c. Collateral must be pledged at face value. Financial institutions must provide the investor with periodic inventories of pledged collateral, showing both face and market value.

d. Collateral must be pledged and separately segregated in the name of the investor (i.e., AMS-Budget Office, Board, Milk Market Administrator, or Administrative Committee), to prevent double pledging.

e. Collateral not held by the Federal Reserve Board must be held by a financial institution authorized by Treasury as a Federal Depositary, having FDIC insurance, and approved by the Federal Reserve Board.

f. AMS investment records should be kept for 6 years and 3 months, as required by the AMS Records Management Program.

B. The *Compliance Office, Compliance and Analysis*, will conduct at least two reviews of the investment decisions process for the AMS investment program per year. Investment authorities outside the AMS investment program will continue to be reviewed as outlined in their investment authority.

C. All *employees* authorized to conduct business with any financial institution participating in the AMS investment program must sign a disclosure statement indicating any personal relationships with those financial institutions. In addition, they will be required to complete an annual Confidential Financial Disclosure Report (SF-450).

VII. INQUIRIES

Direct inquiries to AMS, Compliance and Analysis, Budget Office.

Enrique E. Figueroa, Ph.D.
Administrator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

&

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

AFFIDAVIT OF RONALD W. WARD

STATE OF FLORIDA)
: SS
COUNTY OF ALACHUA)

I, Ronald W. Ward, your Affiant, being first duly sworn on oath, depose and state as follows:

1. That your Affiant provided this affidavit based upon his personal knowledge and experience as an agricultural economist. If called as a witness to testify in the above-referenced case, your Affiant could competently testify to the facts set forth herein.

2. That your Affiant's education, professional accomplishments, publications, and related matters are accurately stated and made part of his resume, a copy of which is attached hereto and incorporated herein by reference.

3. That your Affiant's opinions related to the Beef Promotion and Research Act, and the Beef Promotion and Research Order, are accurately stated in his report dated October 11, 2001, a copy of which is attached hereto and incorporated herein by reference.

4. That the basis upon which your Affiant has formed his opinions, as contained in his report dated October 11, 2001, are all materials and sources upon which professionals within the field of agricultural economics customarily rely.

5. That the opinions expressed in your Affiant's report dated October 11, 2001, are stated within a reasonable degree of certainty in the field of agricultural economics.

6. The methods, and the statistical and economic models, used to reach the conclusions and opinions expressed in your Affiant's report are typically used by agricultural economists, and have been proven to be reliable.

7. That your Affiant does hereby declare under the penalty of perjury that the foregoing is true and correct.

Dated this 17 day of October, 2001.

/s/ RONALD W. WARD
RONALD W. WARD

Expert Testimony by
Ronald W. Ward, Professor
University of Florida

Re: Livestock Marketing Association, et al. v. United States Department of Agriculture, et al., CIV. 00-1032

Date: October 11, 2001

Signature: /s/ Ronald W. Ward

I am a full professor of agricultural economics at the University of Florida and have been on the staff since 1970. My educational background includes a B.S. degree in agricultural economics from the University of Tennessee (1965); a M.S. degree in agricultural economics from Iowa State University (1967); and a Ph.D. in economics and statistics from Iowa State University in 1970. From 1970 to 1976 I also had an appointment with the Florida Department of Citrus as a research economist working much of the time on generic advertising issues with the citrus industry. In 1976 I moved over full time to the university even though I was located in the department since 1970. I teach graduate courses in econometrics and agricultural market structures. Most of my research time is dedicated to dealing with commodity promotion issues, working on both domestic and international issues associated with demand and the impacts of promotions. Over the last several years I have worked with many of the commodity boards in both a research and advising capacity. Some of the more recent activities include work with the Cattlemen's Beef Research and Pro-

motion Board; Washington Apple Commission; Promo-Flor; Flower Promotion Organization; Florida Citrus Commission; National Dairy Board; National Watermelon Commission; Meat and Livestock Commission of the United Kingdom; International Tea Group of FAO, Rome; University of Gent, Belgium; University of Madrid, Spain; Mushroom Promotion Board; California Almond Board; etc. I testified in both the Almond and Mushroom cases when there were challenged in the late 90's. Every other year I give a two-week seminar on commodity promotions at the Institute of Mediterranean Agronomics in Zaragoza, Spain (Ward, 1997). Also, my graduate class at the University of Florida includes a section on commodity promotions. In 1993 I coauthored the book "Commodity Advertising: The Economics and Measurement of Generic Programs" and this book is the only comprehensive reference dealing exclusively with generic advertising (Forker and Ward, 1993).

Much of my comments below are based on my experience with the beef programs where I have had a contract to evaluate the programs using various econometric modeling techniques. This work has been ongoing since the late 1980's when the beef program first stated (Ward, 1999; Ward, Moon, and Jauregui, 1996; Ward and Lambert, 1993). The research has evolved over the years and I draw from the current and past studies. At this moment I am concurrently working on generic promotion projects dealing with U.S. beef, watermelons, flowers, grapefruit, U.K. beef, Belgium beef, Spanish olive oil, and black tea through FAO. I have traveled throughout the U.S. and foreign countries giving lectures and seminars on commodity promotions. In September I returned from England

where I completed commodity promotion seminars to the U.K. Meat and Livestock Commission and the U.K. Agricultural Economics Society.

* * * * *

Theoretically, any producer could promote his/her product with or without the existence of an industry wide generic program and there is nothing in the enabling legislation prohibiting individual action. However, two aspects of many agricultural goods make that decision often prohibitive. First, the cost of a meaningful promotion program to an individual is likely so large that it is an impractical option except in those cases where the producer has a large share of the market. Secondly, given that the product has little differentiation then even if one producer is successful in funding a promotion program there is a "free-rider" problem where others benefit without sharing in the costs. Given both the high entry cost for developing a meaningful promotion program and the free rider issue, for many industries the only option is to fund an industry wide effort with a program designed to have equitable benefits to all producers. This effort could be on a voluntary basis but will create problems with the equity since some may [choose] not to participate even though they benefit equally, assuming the program is beneficial. The alternative is for government involvement through providing the legislative authority and oversight for a mandatory program subject to periodical review and vote. That is precisely the current status of most of the national checkoff programs existing in the U.S. Without this alternative it is impractical if not impossible for producers within some industries to address the informational needs for the good of the total industry. That is, the promotions simple could not

take place because of the high entry cost and the equity concerns in terms of free riders. Allowing each individual the choice to participate (e.g., allowing refunds or voluntary) becomes a major barrier to allowing the industry to fund an equitable joint effort. In turn this may prohibit many smaller producers from having any option to communicate with consumers (i.e., to speak.)

* * * * *

Given this setting, I have been asked to address the specific of the beef checkoff and the importance of the beef industry to the U.S. economy and the overall benefits of the beef checkoff programs. In the following sections I will address these issues. I feel particular[ly] qualified in addressing the economic impact of the current beef checkoff promotions since I have been responsible for doing the economic evaluation of the programs for some time.

Importance of the Beef Industry to the U.S. Economy

The U.S. beef industry is one of the larger agricultural sectors with production spread throughout most of the U.S. Over the last two decades there has been an average slaughter of 8.8 million head per quarter (see Figure 1) with around 79 percent being fed cattle versus cows, bulls, and others. Total agricultural farm marketing since 1980 have ranged from $139 billion to more than $200 million annually (see Figure 2) and the beef sector generally accounted for 15 to 25 percent of the expenditures depending on the year (USDA). From 1980 through 1999, farm marketing of beef and calves total $677 billion and represented 20.6 percent of the total U.S. farm marketings. Furthermore, over the decade of the 90's at least 80 to 85 percent of U.S. households reported including some beef in

their in-home consumption within a typical two-week period (Ward, 2001). It is clear that beef is of substantial importance to the nation given the wide geographical distribution in production, its share of the agricultural marketing value, and its importance to the diet of the majority of U.S. consumers. Hence, there is clear and compelling reason for the government to have substantial interest in the viability of the industry. One can look to the government's quick preventive response to issues associated with foot-n-mouth disease and BSE in Europe to see the value of the industry to the nation and to cattle producers. Beef is a vital part of the U.S. food chain and to the underlying industries supporting the production of beef and its distribution.

* * * * *

Impact of the Beef Checkoff

Given the importance of beef to the nation and the existence of the beef checkoff, then the most fundamental question is if the existing beef promotion programs have had a measurable impact on demand for beef. If they have not, then the free rider issues would not be germane since there would be no gains to be realized. Therefore, the ability to measure the impact of the promotion is central to the legal issues. I have completed the analysis of the beef program for several years and finished the latest evaluation in February, 2001.

* * * * *

There is overwhelming evidence using three independent econometric approaches that the beef checkoff has had a measurable and statistically significant impact on the demand for beef. Following arguments by

Nichols, the positive response provides clear evidence that consumers value the information through their response in demand (Nichols, 1985).

Let me turn two graphs to illustrate the impact of the beef checkoff on demand at the retail level. Figure 8 shows the change in beef demand based on the household eating model and Figure 9 shows the same for the household servings model. The bottom left axis shows a range of retail beef prices and the bottom right axis gives the range of quarterly beef promotion expenditures. Then the vertical axis shows the changes in beef demand over both prices and checkoff expenditures. Movements along the right axis and the corresponding increase in the vertical axis (i.e., beef demand) illustrates the gain in retail beef demand that is directly attributed to the beef promotions. These two household models provide independent evidence of the statistically significant impact of the beef checkoff on retail demand for beef as seen with the rising demand as promotion expenditures are increased. Clearly, the two models point to gains in beef demand either in pounds per capita or servings per household member. Claims that the program does not have a measurable impact are simply not supported by the statistical evidence.

* * * * *

Using these time series model estimates (see Table 2), cattle prices were simulated with and without the checkoff expenditures. Liveweight revenues with and without the beef checkoff efforts were than calculated over the full life of the program since 1987 with and without the beef checkoff (Ward and Lambert, 1993.) From 1987 through the first quarter of 2000, total re-

venues back to cattle producers for slaughter sales were predicted to be $321.18 billion. These revenues were calculated to drop to $314.72 billion without the beef checkoff, giving a difference of $6.46 billion. The $6.46 billion represents the added revenues directly attributed to the beef checkoff for slaughter cattle sales. All checkoff assessments were totaled and subtracted from the total gains and then the net gains were divided by the same assessments. This method of calculating the rate-of-return gave a value of 5.67 to the beef checkoff. On average, for each dollar spent on the checkoff assessments, an additional 5.67 net gain to producers was estimated based on the time series approach. These estimated gains are comparable to those calculated using the beef servings model discussed above. Also, the 5.67 rate is the number most frequently quoted by the industry as the average gains attributed to the beef checkoff.

While the result above represents the most recent evaluations including the broader approaches, earlier evaluations have consistently pointed to rates-of-return comparable to the 1 to 5 range indicated above.

Given the marginal returns of 1 to 5.6 with the servings model and the average rate-of-return of 1 to 5.67 for the time series model, my conclusion is that the beef program is in fact underfunded. Clearly, they have not overspent if one uses the marginal gains as an indicator. Expenditures could be increased by more than 50 percent before the marginal and average gains approach a level of one (i.e., a dollar of promotions just returns a dollar of expenditures back to producers.) Furthermore, over the life of the beef checkoff approximately 2.9 percent of the funds went to administrative overhead and 2 percent for producer communication. These

administrative costs are less than the relative levels seen for many other commodity programs (Forker and Ward, 1993). I am not in a position to outline all the details including in the 2 percent producer communication. However, based on the rates-of-return and budgeted expenditures, my conclusion is that the programs are not more extensive than needed to meet the government interest in the programs (Ward, 2001).

My overall conclusion from extensive evaluation of the beef programs over several years is that the programs have had a positive economic impact on the demand for beef and that impact can be measured with statistical confidence. Compared with other generic programs, the rate-of-return is consistent with gains shown for many other commodity programs (Forker and Ward, 1993; Ward, 1997).

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. 00-1032

LIVESTOCK MARKETING, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

TRIAL TRANSCRIPT

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[Volume 1]

[Testimony of John Smillie – Excerpts]

[18]

* * * * *

JOHN SMILLIE, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HEIDEPRIEM:

* * * * *

Q Would you introduce yourself to the Court and tell him what you do.

A Yes. My name is John Smillie. And I'm the Program Director for the Western Organization of Resource Councils in Billings, Montana.

Q And does that association go by an acronym?

A Yes. We're known usually as WORC.

* * * * *

Q Does WORC have individual members?

A No. WORC is a regional network of grassroots community groups of now seven western states.

Q Is one of those states South Dakota?

A Yes.

Q What are the other states?

A Montana, North Dakota, Wyoming, Colorado, Idaho, and now Oregon, eastern Oregon.

* * * * *

[20]

* * * * *

A Well, quite some time ago we did research into commodity [21] * * * checkoff programs. And then, oh, approximately three, four years ago we took a position at WORC based on the positions of our member groups that we believed that the checkoffs should not be mandatory and we began working to try to reform the checkoffs so they were no longer mandatory checkoffs.

Q Mr. Smillie, is it fair to say that one of the important issues to WORC is the promotion of the economic interests of the United States cattle producers?

MR. LEV: Objection. Leading, Your Honor.

THE COURT: Overruled.

A Yes, that's right. One of our purposes is to promote just, and sustainable, and viable, and strong

communities in our states and, so, we're always working for the kind of, you know, economic development, economic structures on our communities that our members support.

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[24]

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Q Focusing just on the three bundles that you've seen there, that is Exhibit A to the Joint Stipulation, the first bundle we showed you, and then Plaintiffs' 26A through L, and Plaintiffs' 27A and B, in examining those, Mr. Smillie, could you find any message promoting the interests of American beef as distinct from foreign imported beef?

A I don't believe I saw anything in those exhibits relating to that.

Q Specifically focusing on that promotion as it occurs here at home?

A Correct. Not to American consumers, no, I did not see that.

Q Does your organization object to that message?

A We do.

Q Can you explain to the Court why you object to that message?

A Well, we support the promotion of U.S. beef, of offering American consumers the choice of producing beef produced from American cattle. And, so, the promotion of generic [25] beef from either the U.S. or overseas doesn't fit with what we think should be promoted.

Q Mr. Smillie, are your members, that is, the members, individual members of WORC, to the beef checkoff compelled to associate with an entity called the NCBA?

A We believe they are.

Q What does the NCBA stand for?

A The National Cattlemen's Beef Association.

Q And how is it that they're compelled to associate with the NCBA?

A Well, we believe that the checkoff dollars that make up a large part of the NCBA's budget help support the organization. And it promotes positions with which we disagree and it opposes positions and issues that we favor.

* * * * *

Q Now, in examining the three bundles of documents that you testified are representative of the message purchased with beef checkoff funds, were you able to identify any of those messages that indicated the sponsorship by the United States Government?

[26]

A I don't recall seeing anything like that in those messages, no.

Q You've testified that because of the beef checkoff your members are compelled to associate with the NCBA, is that correct?

A Correct.

Q You testified that you object to that association?

A Yes.

Q And you said, I think, there were political positions that the NCBA had taken with which your organization disagrees, is that right?

A That's right.

Q Can you identify those positions?

A Ah—

Q Other than what you've already testified.

A. Correct. Well, one is the support of the mandatory checkoff.

But we—WORC supports, for example, country-of-origin labeling for any animals born, raised, and slaughtered in the United States. Ban on packer ownership of cattle. Other regulation of what are known as captive supplies of cattle. We had a petition for rule making to the United States Department of Agriculture for a way to enforce the Packers & Stockyards Act concerning those captive supplies that was opposed by the NCRA. The NCRA takes positions on [27] trade issues that are different from those that our members support.

Q Mr. Smillie, would you say that the economic interests of the United States cattle producers as distinct from foreign producers is germane to WORC's overall purpose?

A Well, yes. Our interests are in promoting, again, strong rural communities and in just economic systems and in promoting the economic interest of the cattle producers who are members and live in the communities in which we're organized. And to do that we promote—promoting their economic interest means promoting the cattle—beef from the cattle they produce as opposed to beef from either imported directly

or from cattle that are imported that's basically competition to them.

Q And is that why you have become involved as a plaintiff in this case?

A Well, we became involved as a plaintiff in this case because we believe that, again, the checkoff was not in our members best interests. We didn't support a mandatory checkoff. And, so, we had attempted to end the mandatory checkoff by working for a referendum to get a vote of the producers. And then we joined in again because we believe that there should be a mandatory checkoff. We joined also with the complaint alleging that the checkoff unconstitutional as forced speech.

[28]

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CROSS-EXAMINATION

[29]

BY MS. McKEE:

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[38]

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Q With whom at USDA did you share this view?

A We wrote concerning our objections to the association with NCBA and requesting an audit. I don't know what year that was.

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[39]

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CROSS-EXAMINATION

BY MR. BREWERS:

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[44]

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A Well, we've been very strong supporters of country-of-origin in labeling which both the USDA and NCBA have opposed in the form that we have promoted it. And if you don't label beef by its country-of-origin it's very hard to promote it to the consumer in the United States as U.S. beef as opposed to foreign beef.

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REDIRECT EXAMINATION

BY MR. HEIDEPRIEM:

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Q Finally, you talked a little bit about whether, in response to Mr. Brewers' question, whether you object to the foreign marketing of U.S. products with checkoff dollars. Do you remember that question?

A Yes.

Q And you said you thought it should apply also to the United States.

A Correct.

Q But it doesn't, does it?

A Not to my knowledge.

Q In fact, the marketing of beef through checkoff dollars is, as it relates to this market in the United States, entirely generic?

A Yes.

Q Your members object to being compelled to pay for that?

A They do.

* * * * *

[Testimony of Nancy Robinson – Excerpts]

[50]

* * * * *

NANCY ROBINSON, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HEIDEPRIEM:

Q Would you introduce yourself, please, to the Court.

A Your Honor, I am Nancy Robinson. I'm Vice President for Government and Industry Affairs for the Livestock Marketing Association.

* * * * *

[51]

* * * * *

Q What is LMA?

A Livestock Marketing Association is a national trade organization that represents livestock auction markets, commission firms, dealers, order buyers, and other related business. We provide services to our member businesses, as well as look out for the general conditi .. of our market customers, which are livestock producers in the United States.

* * * * *

Q Of the 800 members, Nancy, do you have a rough idea of the number of those who are also cattle producers?

A Well, based on our experience, we would say that there is at least 90 percent of our members that have some type of cattle production operation.

* * * * *

[52]

* * * * *

A I would say 90 percent or more, probably.

* * * * *

Q Is it fair to say that in your involvement with LMA that's the subsection that most clearly defines what you do?

A Absolutely.

Q And that's to improve the condition of persons engaged in the business of the livestock industry?

A Yes.

Q That would include both sale barns and cattle producers?

A That's right.

[53]

* * * * *

Q Nancy, would you describe for the Court just generally the involvement LMA has had in the beef checkoff issue.

A Well, not only are LMA members market and dealers, and markets, in particular, and commission firms, collectors of the checkoff, the principal collector, actually, of the checkoff, but we also, as many of them being cattle producers, pay into the checkoff as well.

Q Is it fair to say, Nancy, that one of the purposes of LMA is to promote the economic interests of cattle producers in the United States?

* * * * *

[54]

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A Yes. If they don't prosper our market doesn't prosper.

* * * * *

Q I'm going to ask you to direct your attention to the exhibits previously looked at by Mr. Smillie, and they are there on the bar before you at the witness desk, and they are identified as Exhibit A to the Joint Stipulation of Facts, Plaintiffs' Exhibit 26A through L,

and Plaintiffs' Exhibit 27A and B. Can you identify those exhibits as such, Ms. Robinson?

A Yes. They are beef promotion ads, producer communication ads that are paid for with checkoff dollars.

Q Have you had the chance to review those documents prior to coming to court?

A Yes.

Q Do you believe those documents are representative of the messages purchased by the beef checkoff, based on your experience?

A Yes.

Q And in examining those documents, Ms. Robinson, could [55] you find any message purchased with these mandatory assessments directed to promoting cattle producers in the United States as distinct from foreign importers here at home?

A No, they are all generic messages.

Q Did you find any reference in any of those messages to them being responsored by the United States?

A No.

Q Any government entity?

A No. They're sponsored by the CBB, which is, you know, the beef promotion, administers the Beef Promotion Act.

Q Do the members of LMA object to the absence of a distinction between American cattle producers and foreign importers as contained in the documents?

* * * * *

A Yes.

Q —Ms. Robinson?

A Very much so.

Q Would you explain to the Court why.

A Well, again, these are generic messages that do not promote U.S. beef which we believe to be superior to imported beef and, therefore, we object to any message that does not promote U.S. beef.

Q What makes you think that United States beef is [56] is superior?

A Well, I think you could ask anyone in the United States, in particular the cattle producers that produce our cattle, that it's superior in quality and taste, and in their production methods.

* * * * *

Q Why wouldn't it be sufficient for the beef checkoff to do what it's doing, to support generic advertising, to place foreign imports and American beef on the same level?

A Because imported beef is not as good a product as we produce in this country. And our producers should not be compelled to pay for saying that it is as good.

Q Nancy, what is the NCBA?

A The NCBA is the National Cattlemen's Beef Association. They are a national trade association of cattle producers.

Q Is it a government entity?

A No.

Q Is it an industry organization?

A Yes. Like LMA.

Q Do you know what the projected revenue is for the NCBA for the year 2002?

A I believe it's about 62.5 million.

[57]

* * * * *

Q Ms. Robinson, are you generally familiar with the budget statistics involved in the beef checkoff?

A Yes.

* * * * *

Q What do you know to be the projected percentage of revenue for the year 2002 for the NCBA made up of checkoff funds?

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[58]

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A $54.4 million. If you include both the CBB revenues and State Beef Council investments.

Q Do you know how much the beef checkoff is expected to generate for the year 2002?

A I believe they estimate 45 million.

Q The entire checkoff?

A Well, that's the national portion. Obviously another 45 million would be on the state portion of the 50 cents portion.

Q So of that portion, the amount that you know to be projected as revenue for the NCBA is something over $50 million?

A Yes.

Q And that's a private entity?

A Yes.

Q Do your members object to being compelled to associate with the NCBA?

A Yes. We often disagree on policy issues. That we feel as a result of the merger of the dues policy side of the organization with the checkoff promotion side that their policy positions are enhanced through those checkoff dollars that go into the organization.

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[60]

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Q Then why is it that you believe the fire wall is not intact between those two entities?

A Well, for one thing, in our view the organization is seamless in that the staff on the policy side is also doing checkoff projects, whether it's promotion, or research, industry communications, etc.

Q Is what you've just testified to with regard to those two entities within NCBA a part of why LMA is opposed to being compelled to associate with them?

A Yes.

Q Are there any other reasons?

A Well, again, they often—or, not often, but they do at times take policy positions of which we do not support.

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[61]

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Q Is it fair to say, Ms. Robinson, that one of the purposes of LMA is to promote the economic interests of American cattle producers?

A Yes.

* * * * *

THE COURT: Ma'am, did I understand your testimony that the checkoff nationally raises about $62 million?

A The projected budget for the national portion is 45 million, I believe. Then the states receive 50 cents of the dollar checkoff, so another 45 million. Then they also, at least in the revenues of the checkoff division of the NCBA, they also receive, as well as CBB national revenues, they also receive State Beef Councils investments. In other words, state funds moved to the national.

THE COURT: Let me ask the question again. What's the $62 million?

A The $62 million is their total revenues. Again—

[62]

THE COURT: $62 million is whose total revenues?

A The NCBA's.

THE COURT: And of the 62 million revenues to the National Cattlemen's Beef Association, about 54.4 million comes from checkoff funds?

A Right.

* * * * *

Q What is the Beef Operating Committee?

A Well, I consider them the management arm of the Cattlemen's Beef Board in that they are the ones that determine what projects are funded.

Q How many members are on the Beef Operating Committee?

A Twenty members.

Q Where do those members come from?

A Ten come from the Cattlemen's Beef Board and 10 come from the Federation of State Beef Councils.

Q Are any of them—do any of them require appointment by [63] the Secretary of Agriculture?

A The 10 members of the Cattlemen's Beef Board.

Q And the other 10 do not involve the USDA process?

A No.

Q They are just from this private organization, the NCBA?

A Yes. And from the Federation of State Beef Councils.

Q Is it fair to say that neither the government nor the NCBA has a majority vote on the Beef Operating Committee?

A Well, certainly the government doesn't. I might argue with you about whether NCBA does.

Q And the purpose of the Beef Operating Committee is what?

A Again, they are responsible for approving budgets, and priorities, and projects for the Cattlemen's Beef Board.

Q So if I, myself, go to the entity and I've got an idea of a project I'd take it somehow eventually to the Beef Operating Committee, right?

A Right. Yeah, you'd bring it up through the Advisory Committee for the NCBA to the Beef Operating Committee.

Q And they would make the decision?

A And they would make the decision.

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[85]

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REDIRECT EXAMINATION

BY MR. HEIDEPRIEM:

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[86]

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Q Do you have any idea why we simply can't use checkoff dollars in the United States to promote American raised beef here?

A No, I don't know why we don't. That's what we should be promoting.

Q And, instead, what we have is a system of generic promotion, is that correct?

A That's correct.

Q So in foreign markets it's okay to label a product as American but here at home with use of checkoff dollars that's strictly forbidden?

A That's right.

Q And your membership objects to that, doesn't it?

A That's correct.

* * * * *

[Testimony of Patrick K. Goggins – Excerpts]

[89]

* * * * *

PATRICK K. GOGGINS, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HEIDEPRIEM:

[90]

Q Would you introduce yourself to the Court, please Pat.

A I'm Patrick K. "Pat" Goggins from Billings, Montana.

Q What do you do in Billings?

A I'm in the livestock business, both as a grower, a breeder of livestock, and owner of a livestock market. I develop, background, and feed cattle.

Q You are subject to the mandatory assessment of the beef checkoff, I take it?

A Yes, sir.

Q Are you a member of LMA?

A I am.

Q Do you hold any leadership position in LMA?

A I'm currently the president of LMA.

Q As president do you help formulate positions of the association and decide when the association should become involved?

A Yes.

Q I take it their involvement here in this First Amendment claim is with your approval?

A Yes.

Q Would you describe for the Court in your own words what you believe the purpose of LMA to be.

A Well, Livestock Marketing Association, there's some 1200—not quite 1200 markets in the United States in which a few over 800 are members. These are markets, and marketers, [91] and order buyers. People who are in the business of price discovery. And we're very—we're very sure that price discovery is the most important part of a cattleman's monetary being. And we attempt very much to get a fair price for his product.

* * * * *

Q Would it be fair to say, Mr. Goggins, that the promotion of the economic interests of the American cattle producer is one of the matters of importance to LMA?

* * * * *

A It's foremost.

* * * * *

[92]

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Q You testified already that you, as a cattle producer, are subject to the mandatory assessments of the checkoff, right?

A Yes.

* * * * *

Q And you were a part, obviously, of the decision to become involved in this challenge to compelled speech?

A Yes.

Q In the course of your experience as a cattle producer and a livestock market man have you had the chance to see the messages purchased with beef checkoff funds?

[93]

A Yes.

Q Sitting before you by the microphone are three packets, and I will simply ask you, you've previously to court today had a chance to examine those three exhibits representing examples of beef checkoff messages?

A Yes.

Q Were they representative of other messages you had seen in the course of your life as a cattle producer?

A Yes. They're generic in order.

Q They're consistent with other things that you've seen, whether they are included in those packets or not?

A That's right.

* * * * *

Q In your examination of those exhibits, being Exhibits A, 26, and 27 and their subparts, did you see any message promoting American cattle producers as distinct from foreign imported producers?

A No. None.

Q Do you object to that?

A Very much.

Q Would you describe to the Court why you object?

A Well, when you—the trend we're on of promoting, for instance, "Beef, it's what's for dinner," a good ad, except [94] that beef is a generic term. And the more you promote beef consumption here in the United States the more you create demand for foreign beef.

Q Do you believe foreign beef imported in the United States is increasing?

A It is increasing handedly.

* * * * *

[Q] Have you described all the ways in which you disagree with the message that you observe in those exhibits?

A Yes. You get—we get to a position where we keep it a generic policy. For instance, I run a lot of cows. I'm a breeder of livestock. And I have been for 50 years. And I've been a member of NCBA. They

used to be ANCA, and then NCA, and then NCBA. But I've been and still am a member. And I'm one of many who resent, very much resent the idea that we in the United States, superb beef, are not allowed to see our national organization promote United States beef to United States people. Why do we use checkoff dollars to promote United States beef to Japan and to other foreign nations? We don't go over there and say eat some beef. No, no. We go over there and say eat fine U.S. beef. This does not happen in the United States. So, the more we promote the generic beef, I'm compelled, as a payer of the dollar checkoff, I'm compelled by law to [95] promote and pay for the promotion of foreign product. And it is an inferior product if it is not blended, especially the ground product. What makes it good is the blend they use from the trim of the fed carcass. That makes a wonderful luscious sandwich. But I'm paying for it, and I resent that.

Q Mr. Goggins, you raised an interesting question. When an American—if you and I went to Kessler's Market here in Aberdeen, South Dakota, today and we looked in the meat case could we tell whether a cut of meat was the United States or from Brazil?

A No.

Q Are they all stamped by the USDA?

A If it's been a graded product they are. But there's quite a lot of no roll as well in there. But if it's been through the USDA roll it would be stamped. Much of it may be USDA select, or standard, whatever. Many could be an imported product, no one knows.

Q Do you believe that the products raised by American cattle producers are superior, by and large, to foreign imports?

A Far superior.

Q Is that a position that you've held for a long time?

A All my life.

Q You are opposed to being compelled to subsidize a [96] message that treats them as roughly equivalent?

A Well, yes. Generically if you just advertise beef you are advertising beef worldwide. But why, I ask, do we not promote U.S. beef here in American just like we're promoting it abroad?

Q Mr. Goggins, in reviewing those beef checkoff purchased messages, which are the exhibits I've previously talked about, did you see any suggestion there that that was messages from the United States Government?

A No.

Q You're aware that the United States makes the claim that this is a matter of government speech and, therefore, exempt?

A The United States does? Or who is making that claim?

Q The defendants in this case.

A The defendants, all of them, yeah.

Yes, I'm aware of that. And there's a very huge amount of resentment on the part of the folks I've talked to across western American, especially many, many ranchers and feeders who have been paying in the dollar checkoff, all of a sudden are led to believe that all of their money has been going toward "government speech." And I am getting a real huge feedback from across America very resentful of being paid as dollars creating government speech.

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[98]

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Q In the course of your work with LMA has your organization opposed positions taken by the NCBA?

A Yes.

Q Can you describe for the Court the difficulties you've had?

A The difficulties have been—well, I was a member of several committees through the years of the old NCA and then the NCBA, and it was, for instance, in the policy making and through the resolution, the way things work in committee, good idea, nothing wrong with it. But I remember being in the marketing meeting, big full house, room about this big, full, and there's quite a query, quite a lot of cattlemen and folks there had a great amount of thoughts on their mind about imported beef and what was happening to us. And the questions would come along. The chairman would be up at the [99] desk and his secretary. But the person sitting in the front row fielding all the questions was Bruce Bass, the head buyer for Iowa Beef Packers. And it was quite resentful for a lot of people there that he, as a member of a packing group, would be fielding the questions and doing the answering. And things like that go on, you get steamrolled. You just cannot get something done. And this is being reflected, I think, in some of the states that are pulling out, they're pulling away.

Q Excuse me. Mr. Goggins, there's been testimony here, or questions, anyway, about an alleged fire wall

between the Policy Division of NCBA and the Federation Division. Have you heard that testimony?

A I've heard that. But if there is, I've never been able to witness it or even see it.

Q Do you believe there is such a fire wall separating those divisions?

A It's one of a myth. I do not believe it actually exists.

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CROSS-EXAMINATION

BY MR. LEV:

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[100]

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Q And I've come to learn that you're a cow-calf operator and one of the largest beef stock producers in the country, is that right?

A That's right.

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[101]

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A Formal, no. But my involvement with it for a lot of years I don't know of one operator or owner that does not own livestock, or run cattle on grass, or feed some cattle, or have a cow herd, or all of the above.

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REDIRECT EXAMINATION

BY MR. HEIDEPRIEM:

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[109]

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A This lawsuit, of course, I think come along because of the dissention, the split, and it's unfortunate that there's a split and the wound has been so deep and I resent that very much. Because I really believe in the American cattle industry.

Q You go on to say in that column that you believe there should have been a referendum, right?

A Yes.

Q Do you believe, Mr. Goggins, that beef checkoff dollars should be used to promote a generic message about beef whether it's American raised or foreign?

A No.

Q Would you support a beef checkoff program, even if there was a referendum on it, if it continued to promote beef generically?

A No.

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[Testimony of John L. Smith – Excerpts]

[111]

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JOHN L. SMITH, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you introduce yourself to the Court.

A My name is Johnnie Smith. And I'm from Fort Pierre, South Dakota.

Q Are you a cattle producer, John?

A I'm a cattle producer, and I raise cattle, and I also have a partnership in an auction market.

Q Do you pay the beef checkoff every year?

A Yes, I do.

Q Are you a member of LMA?

A Our market is a member of LMA.

Q Are you a member of NCBA?

A Not any more.

Q What happened?

A Well, I just thought that they weren't—they weren't—didn't have the best interests of the producers in mind and they were affiliating with the major feedlots, [112] and the packing industry, and the retailers and I thought it was a waste of time to try to help an organization that was against the producers or paying the dollar.

Q Are you a member of R-CALF[?]

A Yes, I am.

Q Would you tell us about what R-CALF is.

A R-CALF is a new organization for the producers. Started out in Montana. And it's an organization that has been lobbying Congress and trying to get things better and it's a good organization. They're for the people that are paying the dollar only they don't get the dollar from them.

Q What's the main purpose of R-CALF as it relates to the promotion of beef?

A Well, R-CALF has been very high visibility in trying to get the imports stopped in the United States. And all the unfairness in the import industry to compete against our cattle here in America.

Q Are those political views that you hold very strong?

A Yes, I do.

Q Johnnie, are you generally aware of the generic promotion in advertising that's been paid for with the checkoff dollars?

A Yes, I am.

Q You're aware of the, "Beef, it's what's for dinner," type campaign?

[113]

A Yes, sir.

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Q Do those generally look like the type of promotion and advertising you've seen put out with the checkoff dollars?

A Yes, they do.

Q Do you have any objection to those messages?

A Yes.

Q Would you explain what those are.

A Well, we import about 20 percent of our livestock, our cattle in the United States. It's increased every year and now it's up to about 20 percent. This is promoting foreign cattle. This is promoting foreign beef, whatever you want to call it. Once it steps across the border it is actually USDA beef, whether it be across the Canadian border, Mexican border if it comes in and goes some place. And I think our cattle market is taking it in the chins because of this [114] imported beef that we keep advertising for.

Q Explain how you believe the promotion of beef generically increases the foreign imports.

A Well, when they bring their cheap beef in and blend it, it lowers the price here in America. And a lot of my friends have been put out of business because of the devastating cattle market we've had. And at the same time they keep increasing the imports so we don't have a price, discovery method in the fat cattle industry and eliminates our beef suppliers.

Q And is it your belief that the generic promotion of beef directly hurts your business?

A Oh, certainly. Certainly. The generic promotion of beef is promoting the imported beef. If we don't have the imported beef then the people that are feeding the cattle will come and buy our stock cattle and the producers' feeder cattle to try to make them better and get a decent living out of them.

Q Why do you want to promote U.S. beef rather than just beef generically?

A I tell you what, our beef is so much better than this crap that we haul in from all over the world.

Our beef raised here in America is corn feed, it's young —young good quality cattle that are fed well, they don't have a bunch of BPT or anything like that that's been [115] sprayed on or anything like that. God only knows what all they've had down in Argentina, Brazil, Mexico, or whatever.

And at the same time most of these cattle that do come in, the carcasses that do come in to America, are old cattle. They're aged cattle, they've been fatten and running on grass and they're three, four, five years old and they're a lot stringier and tougher and everything else. Our beef is so much superior that you can't imagine.

Q Do you object to being charged with your checkoff dollars to pay for messages that promote generic beef?

A Absolutely.

Q Have foreign imports been increasing or decreasing?

A They've been increasing.

Q Do you know how much?

A I believe this last year I think out of Canada they were up over 30 percent more. And out of Mexico they were, like, about seven or eight percent more. I'm not sure of my figures. But it was in that vicinity the last time I checked.

Q Do Americans know whether the beef that they're buying in their supermarkets is American or imported foreign beef?

A No. It has the USDA stamp on it automatically. Like I said, when it comes across the border it's automatically USDA and you have no idea there.

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Q Do you have any objections or feelings about being associated with the NCBA and its political position through your checkoff dollars?

A Yes, I do.

Q What are those?

A Well, they've done—they've done a lot of things that I felt were against the producers of America. Our individual preducers. Such as we had quite a time with them getting a price reporting thing through. Then after we did get it through they trashed it. Then we got labeling. We haven't been able to get the labeling. What's wrong with labeling our products? And they were never there to help us get labeling, but all of a sudden now it looks like it's going to go through so now they're starting to get on the bandwagon. And many things like that.

Q Now, you understand the checkoff is co-funded by foreign beef importers and U.S. cattle producers?

[117]

A Yes.

Q Do you have any objection to being forced to associate with foreign beef importers?

A Not if they label it. If they label theirs as being from Ethiopia or wherever, that's fine. There's 36 different countries hauling in here. Let's label it from where it is.

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Q You were a member of the NCBA?

A Yes.

Q And did you attend their functions and visit their headquarters?

A I did down in Denver, yes.

Q Do you have a general familiarity with how the NCBA has operated?

A Yes, I have a pretty good idea.

Q Do you have a general familiarity with the Federation or Checkoff Division and the Policy Division and how those interact?

A More or less, yes.

[118]

Q What's your reaction to a description that you've heard today in testimony that there's a strict fire wall between these divisions at the NCBA?

A When I was at the NCBA headquarters in Denver here, I think, about a year or so ago it was mass confusion. You know, they talk about this fire wall. It's a joke.

Q Now, when a dollar is taken from the sale of a cow on the checkoff where does that dollar go?

A It goes to your Beef Council. Goes to your auction market to start with. In South Dakota we have

about 92 or 4 percent in collecting it. And it goes to the South Dakota Beef Council.

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Q Do you have an understanding of how the checkoff dollar is processed through the system through the State Beef Council and the CBB?

A Yes, I do.

Q Are you, in fact, a member of South Dakota's Beef Council?

A I'm a member of the South Dakota Beef Industry Council.

Q Are you familiar with how the checkoff dollars are [119] handled through that entity?

A Pretty well.

Q Could you explain what happens when a dollar goes to the State Beef Council?

A Well, when we get the dollar at the State Beef Council the first 50 cents automatically goes to Cattlemen's Beef Board. The other 50 cents is kept at the South Dakota Beef Industry Council and the expenses for the Beef Council are taken out of it. They amount to about 25 cents of that 50 cents that's left. Someplace between 25 and 30 cents.

Q What—I'm sorry.

A Then the rest of it in South Dakota we send to the National Cattlemen's Beef Board—Beef Association, I should say.

Q I want to understand what you're saying. Of the checkoff dollar, 50 cents is sent to the Cattlemen's Beef Board?

A Right.

Q Fifty cents is retained by the State Qualified Beef Council?

A Yes.

Q And then South Dakota's Beef Council turns around and sends half of that directly to the National Cattlemen's Beef Association?

A Approximately half of it, yes. It goes to the NCBA.

[120]

Q So 25 percent of the checkoff dollar goes directly to the NCBA?

A Roughly. Yeah, roughly that amount.

Q Is it your experience that—what's your experience as far as how the NCBA will award extra seats on its Board of Directors?

A It's by the number, by the amount of money that's sent in from the Beef Council. I forget what the dollars are, but we recently just sent enough money in, had more money than before, so we got an extra seat. And you can buy your way on the Board of Governors.

Q So the more checkoff money that the State Beef Council remits directly to the NCBA that will determine whether or not they get extra NCBA Board of Director seats?

A Right.

Q That's your personal experience as a member of the South Dakota Beef Council?

A Right.

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CROSS-EXAMINATION

BY MR. LEV:

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[121]

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A They always say the CBB contracts with the NCBA for all this stuff. Yet, here, we send our first 50 cents to the CBB and then when we have our second 50 cents there that it is supposed to be to the state, we take about 25 cents out of it for our expenses, the other 25 cents is sent to the [122] NCBA. And I've asked them a lot of times when they tell me it all goes to the CBB how come we keep sending the other 25 cents to the NCBA and nobody has given me a clear answer yet.

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[123]

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A No. I said we're paying the checkoff and they're [124] advertising beef as beef instead of American beef. We're paying—we're being taxed for paying for foreign beef here in America which is taking away our market for the American cattlemen.

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[125]

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Q Mr. Smith, have you ever complained to the Beef Board about the fact that its ads promote beef without

distinction as to whether it's American or imported beef?

A I've complained to the Beef Board quite a few times.

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[127]

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A Our producers were being eliminated, and we weren't getting any support from the NCBA, and along comes R-CALF and for the people that were looking out for the individual producers, why, NCBA was siding with the packers, the big feedlots, and the retailers. The people who were paying the dollar were being left out of the whole thing.

Q And, so, you joined R-CALF because as a cattle producer you thought that was an organization that was going to represent your interests and your rights, is that right?

A I joined R-CALF because they were going to Congress and trying, and the Federal Trade Commission, trying to improve the dumping and things like that that were hurting our industry.

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CROSS-EXAMINATION

BY MR. BREWERS:

[138]

A What I mean by U.S.A. product is born—bred, born, raised, and fed here in America.

Q And anything that does not meet all of those criteria—

A It's hauled in from Mexico or Canada and fed here, then [139] it's imported beef.

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[141]

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Q USDA controls the message contained in CBB promotional campaigns?

A They have the last say on all of them, you mean?

Q Yes.

A That's what they say, yes.

Q And you would agree with that?

A I don't have to agree with it, no.

Q Well, I'm asking, do you agree with it?

A Do I agree that the USDA should have the last say? No.

[142]

Q Do you agree that they do, in fact?

A They do, in fact.

Q Yes.

A They do, in fact.

Q And you agree with that?

A I think they do. That's what they tell us at the Beef Council. You come up with a program or something like this and they'll say, well, it probably won't fly. You say, why won't it fly? And they say, because it might at headquarters, but USDA will not go for it, so.

Q So—

A So they have the last say.

Q And just to expound upon that for just a moment. Those type of comments come when a project is proposed but it is believed that the USDA will not allow that type of message to be conveyed using checkoff funds, correct?

A Yes.

Q And you've witnessed those type of conversations yourself?

A Yes.

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[Testimony of Herman Schumacher – Excerpts]

[144]

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HERMAN SCHUMACHER, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Herman, would you introduce yourself to the Court.

A I'm Herman Schumacher from Herreid, South Dakota.

Q And are you a cattle producer?

A Yes, I am.

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Q Are you, Mr. Schumacher, generally aware of the generic promotion and advertising that is paid for with beef checkoff dollars?

A Yes, I am.

Q And you pay the beef checkoff personally?

A Yes, I do.

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[145]

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Q Are those representative of the types of promotion and advertising that you've seen being put out with the checkoff dollars?

A Yes.

Q Do you have any objections to those messages contained in those?

A Yes, I do.

Q Why don't you explain what those are.

A Well, to me, the American producer is seeing 20 percent of the beef consumed in the United States being—coming outside of our borders, beef and cattle, that is. And I'm seeing where the American producer is paying for a generic promotion and enhancing the price of foreign beef that comes in here and is in direct competition to his. That's lowering the market for the American cattleman.

Q What type of message would you like to send with the checkoff advertising promotion?

A U.S.A. beef. Beef U.S.A.

Q Do you object to being charged for a contrary message by the checkoff?

A Yes, I do.

Q Do you believe U.S. beef is superior to foreign imported beef?

A Why, yes. You know, we go through a lot of the—first [146] of all, I think not alone superior, but I think our safety standards are better. We're importing beef now from as many as 30 some different countries. And I know there's a lot of countries that have very good safety standards, but there are some in question. And our beef is corn—I mean, is grain fed. It is by far a superior product. And I've traveled this country from border to border and been in a few foreign countries also and American beef is the beef of choice.

Q What's happening to foreign beef imports?

A Foreign beef imports have come up, and I'm just going to—you know, I'm just going to—I've got the information. But since 9-11, September 11th, our imports in October were up 26 percent from Canada alone, 11 percent from Mexico—or, eight percent from Mexico, I believe. Overall our imports from Canada this past year are up 12 percent.

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A Okay. And Mexican imports are up three percent.

Q Do you generally keep track of how much beef is being imported as part of your business?

[147]

A Yes. You know, we've—if I may, I've been in the business now that I'm in for 21 years. And I got started

in 1981. And I just look at what the producer's share of the consumer dollar is and it was at almost 70 percent, today it's down to some 40 percent. So, there is a problem.

Q Do you believe that generic beef advertising of the type we've just talked about paid for with the checkoff, do you believe that that contributes to increased importation of foreign beef?

A Why absolutely. I mean, one thing, I don't know if we touched on it at all today, but look at the difference in the valuation of the dollar. It's a heck of a deal for the Canadians as well as the Mexicans to import to the United States just for the valuation of the dollar.

Q And do the increased foreign imports hurt your business?

A Yes, they do.

Q Explain how.

A Well, again, they go in direct competition with—I mean, our—the beef business and the cattle business is a very supply oriented, I mean, sensitive—supply sensitive business. And I'm saying that in the last 14 years, again going back to the producer's share of the retail dollar, which we've seen it shrink away, and any time that there's more cattle, more beef brought into the United States it's in direct competition with my—with my customers.

[148]

Q Do Americans know where the beef that they purchase in American comes from?

A No, they don't.

Q Why not?

A I just returned from a trip to Washington, D.C., four weeks ago and we went to one of their great—one of the largest grocery stores in Washington, D.C., and had the privilege of talking to the meat manager. She didn't know it. And they sell a lot of beef.

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Q Do you think the generic promotion of beef contributes to the misconception the Americans may have about where their meat is coming from?

A Why, yes. In the store that we were in, in D.C., one of the largest stores in D.C., all of the beef there, and there was four different kinds of, for example, hamburger. And, you know, it went from a 78 percent lean to a 94 percent lean. And there's a very good chance that in the 78 percent lean there would have probably been blended product from all [149] across —all outside our borders, all across the world.

Q Do you have any objection to being associated with the NCBA through your checkoff dollar?

A Yes, I do.

Q What are those objections?

A Well, first of all, you know, I'm forced to be a member of the NCBA because I'm forced to pay my dollar checkoff which eventually a good share of it ends up in the hands of NCBA.

Q What's your objection to that?

A Well, in my mind the National Cattlemen's Beef Association has lost all touch with the grassroots producer out there. And it's evident, everything that we've tried to promote—I belong to another organi-

zation—that we try to promote to try to help the industry, the grassroots producer, the U.S. producer, we've had a heck of a battle with NCBA. And largely coming right out of Washington, D.C., and the halls of our Congress.

Q Do you disagree with some of the political positions being promoted by the NCBA?

A Yes, I do.

Q Just explain briefly.

A Well, country-of-origin labeling, for instance. I know they have their version of it, but it's a long ways from the one that R-CALF proposes.

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[Testimony of Jerry Goebel - Excerpts]

[156]

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JERRY GOEBEL, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you introduce yourself to the Court.

A I'm Jerry Goebel from Lebanon, South Dakota.

[157]

Q And are you a cattle producer?

A Yes.

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Q Are you a member of LMA?

A No.

Q Are you a member of NCBA?

A No. Not any more.

Q Have you ever been a member of the NCBA?

A Yes, we was.

Q What happened?

A Oh, about five, six years ago it just—nothing was [158] going the way we thought it should, so we quit sending in our dues.

Q Mr. Goebel, are you generally aware of the type of promotion and advertising that's been placed out into the media by the beef checkoff?

A Yeah.

Q Have you had an opportunity to review what's in front of you, which is Exhibit A to the Joint Stipulation, and Exhibits 26A through L and Exhibit 27?

A Yeah, I've seen them.

Q Are those reflective of the type of generic beef promotion and advertising that you've seen put out through the checkoff?

A Yes.

Q Do you have any objections to the messages that are being sent out?

A Yes, I do.

Q What are those objections?

A It's just beef. There's no U.S. beef or—and I don't like to see the other countries in there with us, with our beef.

Q What type of message would you like to send instead of these generic beef messages?

A U.S.A. beef would be great.

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Q Does that Declaration accurately reflect your views and your objections to the messages of the beef checkoff advertising?

A Yes.

Q Do you think that these type of generic type of beef messages work to increase foreign imported beef?

A Yes, they seem to. The ex—or, imports just keep going up all the time.

Q Is it your belief that increased foreign imports hurt your business?

A Yes, I do.

Q Do you have any objection to being associated to the NCBA through your checkoff dollars?

A I don't like it.

Q What are your objections?

A Well, that's the main deal, they're not doing what they're—they should be for us and they're—90 percent of the time they're against the ranchers.

Q Do you have political differences with the policies promoted by the NCBA?

A What do you mean by political?

Q Are the[re] positions they take on issues that you disagree with?

A Yes.

[160]

Q What are some of those?

A Well, just—I'm trying to think of them right now. It would be where they—

Q In other words, some of the reasons that made you resign from the NCBA?

A Yeah, it's—well, when they had their meeting there that one time you couldn't get on the—it was down—I don't remember where it was, but it was a long ways away. It was just impossible to go.

Q Is country-of-origin labeling, is that an issue you might have disagreements?

A Yeah. That was one of them, yeah.

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[Testimony of Robert Thullner – Excerpts]

[165]

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ROBERT THULLNER, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Boy, would you introduce yourself to the Court.

A I'm Robert Thullner from Herreid, South Dakota.

Q Are you a cattle producer?

A Yes, I am.

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Q Do you pay the beef checkoff every year?

A Yes, I do.

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Q Are you a member of NCBA?

A No.

Q Are you generally aware of the generic promotion and advertising materials that are put out by the CBB with the beef checkoff dollars?

A Yes.

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[167]

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Q Do you have any objections to those?

A Yes.

Q Why don't you explain what those are.

A I guess as an American farm producer, cattle producer, I object to having my American produced meat and cattle commingled with foreign products.

Q You object to the generic advertising?

A Yes.

Q What would you like to see instead?

A I'd like to see a campaign out there promoting American beef that's produced here.

Q Do you object to being charged for these messages that are contrary to that?

A Absolutely.

Q Have you done a Declaration in this case?

A Yes.

Q Does that accurately reflect your objections to these types of promotional messages?

A Yes, it does.

Q Do you think that these type of generic advertising beef, that type of message increases foreign imports?

A Yes.

Q Why don't you explain why you believe that.

A Because it's promoting meat at the expense of what I [168] produce, it's commingled, and I receive less money for the product that comes off my South Dakota American produced farm.

Q Do you think, then, that the generic promotion that you subsidize actually hurts your business?

A Absolutely.

Q Do you think U.S. beef is superior to foreign beef?

A Yes.

Q Why is that?

A Because I can see how the American farmer raises and produces his livestock, how he cares for it. Health requirements and such.

Q As a cattle producer do you follow the trend of imports?

A Yes.

Q What's been happening to imports?

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A The first part of this year, just using Canada as an example, live imports through August were up 33 percent. Beef imports out of Canada through November were up six percent.

BY MR. PARSONS:

Q Do you attribute that, in part, to the generic promotion of beef rather than the promotion of American beef?

A Absolutely.

[169]

Q Do you have any objections to being associated with the NCBA through your checkoff dollars?

A Yes.

Q What are those?

A Country-of-origin labeling. They don't want to follow the true program. I believe foreign bred, fed, slaughtered in the U.S.

Q. Is it fair to say you have political differences with the NCBA?

A Yes.

Q Do you object to being associated with them through the checkoff?

A Yes.

Q How do you feel about being associated with importers of foreign beef through co-funding the checkoff with them?

A Not very good.

Q Explain why.

A Well, they bring their product into the United States and commingle with mine and my fellow neighbors, it drives down the price creating less market for what we as American farmers are producing.

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CROSS-EXAMINATION

BY MR. LEV:

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[170]

Q Are you a member of R-CALF?

A Yes.

Q And why are you a member of R-CALF?

A I'm a member of R-CALF because I feel they're an organization that's trying to increase my bottom line through American produced livestock.

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[172]

CROSS-EXAMINATION

BY MR. BREWERS:

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[173]

[Q] Do you believe that the checkoff, in the current form, returns any value to you?

A No.

Q No. None at all? Please answer out loud, sir.

A No.

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[175]

A I think what I'm trying to say is that we have meat coming in from 36, 37 different countries, brought into the United States and mixed with American produced meat and sold as a generic product.

Q Isn't that going to happen no matter what happens with the checkoff?

A I don't think so.

Q Can you explain?

A I think that if we have a label that says American produced meat that the consumer would sooner buy that than a foreign meat not knowing where it comes from or what it really was.

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[Volume 2]

[Testimony of Monte Reese – Excerpts]

[187]

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MONTE REESE, DEFENDANTS' WITNESS, SWORN.

[188]

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DIRECT EXAMINATION

BY MS. McKEE:

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[Q] Who is the final decision maker on how checkoff funds are spent?

A The U.S. Department of Agriculture must approve all of our programs and projects.

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[Q] First of all, tell me, are there any limitations on what the Beef Board or beef producer can do with checkoff funds?

A Absolutely.

Q What are those limitations?

A Well, there are several.

The Act and the Order stipulate that no checkoff funds can be used for lobbying, for the purpose of influencing government action. They stipulate that we may not make disparaging comments about another commodity. We cannot with Beef Board funds promote or conduct research with the primary objective of promoting live cattle sales or conducting research on live cattle production practices.

It's a Beef Promotion and Research Act and Order.

Q Surely live animal research is something that cattle producers really care about.

A Certainly.

Q And, yet, you can't state—producers cannot fund that through the checkoff?

A That's correct. Producers—some producers have indicated to me they'd like to fund certain projects. But the authorization in the Act and Order and what USDA will allow us to do must be consistent with that. And

the only time live animals are involved in research is if it's a [198] project clearly and directly related to the consumer's acceptability of beef as an end product.

* * * * *

[Q] Who is the final decision maker, again, on whether a project that is developed with checkoff funds is in—or, appropriately under the Act or not?

A Final authority is USDA.

Q Now I would like you to walk me through this approval process, this developmental and approval process for a checkoff funded project.

Let's take, for example, the BSE problem, the mad cow—for us nonproducers, it's the mad cow issue. Is that something that could be funded under the Act?

A Yes, it is. We've conducted industry information, consumer information programs trying to counter the sensationalizing effects of the those in the media who choose to use this mad cow disease pointing out—as the name for BSE—pointing out the fact that it's never occurred in the United States.

We've also conducted a considerable amount of research on this and other beef safety issues. We've been urged to do that sort of research and work closely with USDA to design information programs.

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[202]

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Q What happens next once the Executive Committee has ratified that proposal?

A Then the proposal is submitted to USDA for final approval. And it is only upon approval of the USDA that the work can begin and the costs be reimbursed.

* * * * *

[203]

Q What happens if the United States Department of Agriculture does not approve the project?

A If USDA didn't approve the project we couldn't spend the money.

Q Assuming that they did, in the BSE research matter, that they did approve the project, how does it get implemented?

A We then, we being the Beef Board, the Operating Committee, enter into a contract with the qualified industry organization to carry out the work of that project.

That contract is also submitted to USDA for approval and it stipulates that we will only reimburse actual and necessary costs and even only certain costs involved with the project itself.

Q Once that contract has been entered into does the work then begin?

A Yes. Assuming USDA has approved the contract. We wouldn't enter into it until USDA had approved both the project and the contract.

Q What if in that project, in that BSE research project, some kind of communication or advertising supplemental project comes out of that, what happens to those, to that advertisement?

A The advertising message would also be submitted to USDA for approval.

[204]

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Q What kind of oversight is there of the Qualified State Beef Council projects?

A It's the same type of oversight as a Beef Board project [205] in that the guidelines for what they can do are established by the Act and Order. Oversight is rendered by both the Beef Board and USDA.

At the beginning of each fiscal year we require * * * each State Beef Council to submit a copy of its marketing plan indicating how they will use checkoff dollars during that year. At the end of the fiscal year we require them to submit an audited financial statement audited by an independent certified public accounting firm that represents how they did, in fact, use those dollars, and we ask those audit firms to make a representation to us as to whether or not in their work anything came to their attention that caused them to believe those functions were outside the parameters established by USDA through the Act and Order.

The Beef Board also conducts what we call financial and procedural reviews of each State Beef Council to look at their expenditures and make sure they are in accordance with the guidelines established.

Q Does USDA see those audits and those financial reports that the Beef Board generates?

A Yes, they do. We submit each of the financial and procedural reviews to USDA.

In addition to that, USDA attends every meeting of the Beef Board Executive Committee where the reviews, the [206] audits, even marketing plans are discussed.

Q What about the project that the Qualified State Beef Councils generate, does USDA or the Beef Board review any of those?

A Yes, we do. For example, if—for the most part the State Beef Councils will simply conduct the same kind of advertising campaign that's conducted at the national level. The Act and Order stipulate that we should have a coordinated state and national program. So, when the creative message is developed it's intended for use at both the state and national level.

If, however, a state, for example, would want to make reference in one of its own ads to the brand or trade name of any beef product, that would have to be approved by both the Beef Board and USDA.

Q And that approval on brand named projects is before the fact, is that right?

A Yes, it is.

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[214]

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[Q] Mr. Reese, you've spoken today about the role that the United States Department of Agriculture plays in the checkoff process. The Department is a large agency and can really only work through its people.

Who do you work with at the United States Department of Agriculture?

A Primarily Barry Carpenter. And until recently, Ralph Tapp, who works with Barry.

Q What sort of working relationship do you have with Mr. [215] Carpenter and with Mr. Tapp?

A It's a very professional working relationship. They attend every meeting of the full Beef Board, every Operating Committee meeting, every Executive Committee meeting. In the time I've been employed at the Beef Board I can think of none of those meetings but what both, either one or the other, or both Barry Carpenter and Ralph Tapp were in attendance.

Q Do you ever talk to them or see them in between those meetings?

A Sure. We talk via telephone whenever the need arises, whenever there's an issue that I need guidance from them or they choose to provide guidance to me. And we may talk on some occasions several times a day, and it may be a while in between times.

Q How would you then characterize your overall relationship with USDA?

A USDA overseas this program. They have the final authority. We often seek their guidance as projects are being developed for submission to the Operating Committee and certainly seek their approval after the project is approved.

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[222]

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Q Finally, Mr. Reese, you had said before and the Beef Board said on occasion that the checkoff program is a producer led program. And, yet, you've testified today about all of the oversight that the United States Department of Agriculture has that program.

Is it really fair to say that this is a producer run program?

A Yes, I believe it is.

Q Why?

A Notwithstanding the fact that it is a government established program and the restrictions on what can be done with checkoff dollars are established by the government and USDA has the final approval authority, if you look at the process by which projects surface, ideas surface, and proposals are developed and submitted to USDA for approval, at every level there are producer leaders involved. It's [223] leaders that wind up serving on State Beef Council board of directors, serving on the Beef Board, serving on advisory committees, serving on the Operating Committee, serving on the Beef Board Executive Committee. Each of those producers are leaders of their industry. And there isn't an expenditure of checkoff dollars that I know of but what it had its genesis in the idea a producer had. That's why I think it's a producer led government supervised program.

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CROSS-EXAMINATION

BY MR. PARSONS:

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[224]

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Q Did you say anything to the effect that live cattle producers aren't eligible to have programs because the programs must center around beef, the end product?

A No, I did not say that. What I did say is that we don't fund programs that promote live cattle sales. We fund programs that promote demands for beef.

I can think of no reason why there would be value in live cattle were it not for beef demand.

Does that clarify the issue?

Q It does.

Can you understand why cattle, live cattle producers would object to paying into a checkoff where their products cannot be promoted?

[225]

A Their product is beef. And it is being promoted.

Q Do we disagree that a live producer's product is live cattle?

A The value attached to that product comes from demand for beef. Now—and maybe I'm not understanding your question.

Q Who sells—I understand the cattle producers sell live cattle. You understand that?

A Yes.

Q Who sells beef?

A A number of entities throughout the beef industry.

Q Packers, processors?

A And others.

Q Distributors?

A Retailers, restaurateurs. The list is lengthy.

Q Do any of those entities pay into the checkoff?

A If they own cattle or import beef, yes.

* * * * *

Q And I think you testified that it was your job to enforce that wall, is that true?

A I think what I testified it was my job to make sure no checkoff dollars were spent inappropriately.

[226]

When it comes to enforcement, I think that role is vested in USDA.

Q Ms. McKee asked you how do we know whether or not there—whether they actually are separate, these divisions in the NCBA, and wasn't your response, ma'am, that's my job?

A That was part of my response.

Q And you're CEO of the Cattlemen's Beef Board?

A That's correct.

Q Why is it the CEO of the Cattlemen's Beef Board's responsibility to enforce a fire wall between the fire wall—between the divisions of the NCBA which is a private beef organization?

A Again, you use the word "enforce." And I'm uncomfortable with that word because I have no enforcement authority.

Q But that's your job?

A I do, as the chief operating officer of the Beef Board, have the responsibility for making sure that our contracts are implemented in accordance with the contract, itself, and with the rules and regulations under which we operate.

Those regulations stipulate cost recovery. Those contracts stipulate cost recovery. It's my job to ensure that we don't compensate any contracting organization, it's part of my job, for more than cost recovery.

Q Do you have to put out a lot of fires along that fire [227] wall?

A If we discover an issue we don't pay the bill.

* * * * *

Q Is that a Cattlemen's Beef Board article?

A The article is about the Cattlemen's Beef Board. But it is not a Cattlemen's Beef Board publication.

Q Who is Sharl Phipps?

A Sharl Phipps is an employee of the National Cattlemen's Beef Association.

Q We see the beef checkoff symbol here.

Is the beef checkoff symbol placed on documents that are put out by the Cattlemen's Beef Board?

A It is used to indicate the checkoff program. The Cattlemen's Beef Board has registered that logo. It's intended to indicate the beef checkoff.

Q So that's the registered logo of the CBB?

[228]

* * * * *

Q Now, we've talked a little bit about this.

But from the original dollar that a producer or importer pays on the checkoff, an importer will pay his full dollar directly to the CBB, is that true?

A That's correct.

Q But a cattle producer, if they are in a Qualified State Beef Council, and it looks like that's 45 of the 50 states.

A Right.

Q They will pay 50 percent of their dollar to the CBB and the other 50 cents stays in the state, is that true?

A Yes.

Q Then the states can pay whatever administrative and promotional expenses they want and they can then remit some of that money directly back to the Federation Division of [229] the NCBA, is that true?

A That's close. They can fund programs in their state as long as those programs are consistent with those authorized by the federal government. And then they may make the decision whether to send money over to the—to supplement the national program.

Q Did you here Mr. Smith's testimony yesterday of his experience with the South Dakota Beef Council?

A I heard his testimony.

Q And he testified that their council was cutting basically 25 percent of the money, they were cutting a check directly to the NCBA. Is that consistent with the process?

A If that's their decision, yes.

Q And the NCBA is a private—

A When you say consistent, that decision is made by each State Beef Council. In total the revenue is about 12 million of that 36 million from the State Beef Councils that goes to some national program.

Q And the NCBA is a private organization?

A The Federation of State Beef Councils is the entity receiving those funds and that's a division of NCBA.

Q Right. So when anyone says the Federation, they're really talking about a division of the NCBA?

A That's correct.

Q Now, the beef promotion and Operating Committee, that's [230] the committee that makes the decision as to what projects get funded and what messages get sent out, is that correct?

A They make the decision on what proposals they wish to fund. The USDA makes the final decision on whether or not they are funded.

Q The USDA has the final approve, yea or nay?

A That's correct.

Q But the decision as to what projects will be funded and sent up for a yea or nay are made by the beef Operating Committee?

A That's correct.

Q And of that—

A Subject to approval by the Beef Board Executive Committee, yes.

Q And of that committee, 10 members are appointed directly from the CBB?

A They're not appointed. They're elected from and by the Beef Board.

Q Thank you.

And those members will be CBB members so they will have been appointed by the Secretary of Agriculture?

A That's correct.

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[231]

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Q The Beef Operating Committee has 20 members?

A Yes.

Q And they make the decisions regarding funding?

A Yes.

Q Ten are from the CBB, elected?

[232]

A Yes.

Q And 10 are elected from, says here, 45 Qualified State Beef Councils. Is that true?

A Um-hum.

Q Now, what this means is the Federation Division of the NCBA, is that true?

A The election process is managed by the Federation Division. But the members of the Operating Committee from the State Beef Councils do not have to be members of the Federation or even on the Board of the Federations. The law says they have to be a member or an ex officio member of a Qualified State Beef Council[.]

Q But they're elected by the NCBA's Federation Division?

A They're elected by the Qualified State Beef Councils who choose to join that Federation.

* * * * *

[233]

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Q And these 10 members are not appointed by the Secretary of Agriculture?

A No. They're elected by the Qualified State Beef Councils. However, they're election is certified by the U.S. Department of Agriculture.

Q Now, I want to look down further and we talk about the contracting organizations. And I want to read, if you would read, the first sentence under that block. Do you see where I'm talking? Where I'm talking about?

A You want me to read that first sentence?

Q If you would.

A "By law, the Operating Committee serves as an independent body, reviewing and approving checkoff programs and contracting with national industry-governed organizations."

Q Now, is that a true statement?

[234]

A I believe it is.

Q By law, the Beef Operating Committee, that's what it's referring to?

A Yes, the Beef Promotion and Research Act and Order established the Operating Committee.

Q By—

A And charged it with responsibility of developing plans and programs for submission to the USDA for approval.

Q By law, the Operating Committee serves as an independent body. You just said that was a true statement. So the Operating Committee is an independent body, right?

A Independent from? Yeah, unlike what you've attempted to characterize it, it's independent from NCBA.

Q And independent from the government?

A No, I don't believe it says that. It says, by law, it's established with certain responsibilities.

Q And then, by law, it is an independent committee.

Also says that they review and approve the checkoff programs. That's their function?

A Subject to USDA approval.

THE COURT: Mr. Reese, I'm still somewhat confused here.

Looking at this chart, it says 45 Qualified State Beef Councils Act to elect 10 producers who then sit on the Operating Committee, is that correct?

[235]

A That is correct, Your Honor.

THE COURT: How does that work, then, the 45 Qualified State Beef Councils all have a meeting and then elect 10 people?

A The 45 State Beef Councils are asked first to submit names for a Nominating Committee. They are asked to submit candidates for the Operating Committee. The Nominating Committee interviews those candidates, recommends a slate, and the State Beef Council delegates to the Federation then elect those 10 producers. They are not required to be members of the Federation. They're required to be members of a Board of directors of a State Beef Council.

THE COURT: But the State Beef Council, of course, must be a member of the Federation?

A Not necessarily, Your Honor.

THE COURT: The Qualified State Beef Council is not required to be a member of the Federation?

A There are 45 Qualified State Beef Councils.

THE COURT: Yes.

A There are only, and I don't know the number, but some of the smaller ones do not chose to join the Federation. They would still be eligible to submit a candidate for the Operating Committee.

THE COURT: Looks like a very cumbersome operation.

A I certainly agree, Your Honor. But it's the one [236] established by the federal law.

* * * * *

Q Another point I wanted to make, these CBB members who go on to the Beef Operating Committee, they're also NCBA members, aren't they?

A Why would they be?

Q Well, you're a NCBA member?

A I am.

Q Aren't all CBB members NCBA members?

A I doubt it.

Q Most?

A I have no way of knowing that. But I doubt it. Because let's go back to those organizations certified by the USDA to nominate. Many of those are State Farmers Union groups, State Farm Bureau groups, State Dairy groups who might have no reason to join NCBA on the policy side. So, I'm confident not all of them would be NCBA members, but I don't have the number.

[237]

Q Why is the government not listed anywhere on this organizational chart?

A I didn't develop the organizational chart, so I'm probably not the one to ask the question.

Q So I guess you wouldn't know why this chart that appears in the NCBA's publication with the CBB's checkoff label looks so different from the one you've drawn out today?

A I don't think it is very different at all.

Q Okay.

A It is not as complete as the one drawn. But it is accurate.

* * * * *

[240]

Q Do you recall testifying a couple of years ago that the CBB only had three employees?

A At one time we did only have three employees.

Q 1999?

A I don't remember the date. At one time we had only three employees. We've increased the staff size since then.

Q Now you have eight employees and a budget of how much?

A The total Beef Board projected revenue?

Q Yes.

A Is 45 million for the current fiscal year.

Q How do eight employees manage a budget of that magnitude?

A I'd like to think very well.

We are required by law to contract to carry out specific programs with existing national not for profit industry-governed organizations. So we do, in fact, contract for program work. Those eight and a half employees carry out the administrative responsibilities of the Beef Board, which includes the oversight of those contracts.

Q And these are these joint staffing agreements?

A We have no joint staffing agreements, as I understand it. Could you be more specific?

Q Joint staffing agreements with the NCBA. You have no such?

A We have an administrative service agreement. I don't— [241] I don't know of any joint staff. I seem to recall that this came up during the deposition and I indicated there was no joint staff.

Q Now, are you staffed by the NCBA. Do you contract out for the NCBA to perform staff functions?

A To conduct programs, yes.

Q Okay. Not joint staff. Purely NCBA staff. Is that true?

A Is what true?

Q That your staffing is done through contracts, much of it with the NCBA?

A The program staffing, yes.

Q Now, in paragraph 9 of Exhibit 207, the testimony was that based on proposals and ideas collected at these meetings, Federation Division employees, that's NCBA employees?

A Yes.

Q Prepare specific national project proposals, with accompanying budgets, in the form of AR's for submission to the Beef Operating Committee, is that true?

A I believe it is.

Q So the Federation Division of the NCBA prepares and submits the project?

A Some of them, yes. The ones covered by this document.

Q And, then, the entity that's submitted to is the Beef [242] Operating Committee?

A Yes.

Q And that's 50 percent made up of Federation Division electees, true?

A Well, you are introducing a term that I haven't used.

They must be members of a board of directors of a Qualified State Beef Council.

Q And, then, actually the staffing of that Committee is performed by the NCBA's Federation Division?

A Of the Operating Committee?

Q Yes.

A No I am the administrative manager of the Operating Committee.

Q Okay. And, then, once the Beef Operating Committee approves a project that is then implemented, according to paragraph 10, by the Federation Division of the NCBA?

A After USDA approves it. We enter into a contract that's approved by USDA, that's correct.

Q And approximately 90 to 95 percent of the project contracts are awarded to NCBA?

A I don't know that that figure is correct. I want to see the numbers and perform the calculation. I would agree that NCBA Federation Division is our largest contractor. I'm not certain of the percentage.

Q If you testified about 90 percent in an earlier case, [243] would that be consistent with your recollection?

A I don't recall testifying to that. But if I had the information available to me, I could tell you exactly what it was.

Q So just to be clear, though, then the Federation Division prepares and submits the proposal?

A Its proposals, yes.

Q They send them to the committee where the Federation Division has 10 members—or the Qualified State Beef Councils do?

A Where the Qualified State Beef Councils have 10 members and the Beef Board have 10 members.

Q And then they award a large majority, perhaps 90 percent of those contracts, right back to the NCBA. Is that a fair statement?

A They also turn down a number of them.

Q Okay. With such a strong role for the Federation Division of the NCBA, which is a private trade organization, does that sound to you like this is government speech?

A Yes, it does. The Federation is established by the Act and Order.

Q Are you here today, Mr. Reese, to tell the cattle producers of America that the messages paid for by their checkoff dollars are not the voice of cattle producers, but are instead the speech of the United States government?

[244]

A I'm here today to say that the beef checkoff conducts programs producers want that USDA will allow and that the federal government authorizes.

Q And there are no taxpayer funds at all in the CBB?

A No.

Q And, in fact, the CBB is required to reimburse the USDA for any oversight that it does?

A We reimburse USDA for the oversight that it does and bills us for.

Q I'd like to take a look at your first Declaration, which is Exhibit 204. It should be in front of you.

And I'm at paragraph 4. Paragraph 3, excuse me. You state that the board is funded wholly through assessments on the sale and importation of cattle. Is that true?

A Yes.

Q So there's no doubt that the funds are not government funds?

A You're asking me for a legal conclusion.

The assessments are authorized by the Act and Order. So I—the authority for the assessment on the sale and importation of cattle comes from federal law.

Q So this is not money belonging to cattle producers?

A After they've paid the assessments.

Q They [lose] ownership?

[245]

A After they've paid the assessment then either the Qualified State Beef Council or the Cattlemen's Beef Board is responsible for those funds.

* * * * *

Q In paragraph 3 you state that while the Board's domestic promotion programs make no distinction between domestic and imported beef—well, let me just ask you.

That's true, isn't it, that the domestic promotion programs make no distinction between domestic and imported beef?

A That is true.

Q So beef is just promoted as a generic commodity in the United States?

A That's generally true. There have been, as we discussed earlier, some brand or trade name references that I think would go beyond the definition of generic.

Q But overseas U.S. beef can be specifically promoted?

A Yes.

Q Can you understand at all why U.S. [] cattle producers [246] might be upset by that?

A Sure.

Q Why do you think they would?

A We heard testimony yesterday that certain individuals now claim to be upset about that. And I can understand those claims.

Q I want to go to paragraph 8. I'm reading the second to the last sentence. Would you read that, the one that begins, "For example?"

A "For example, no decision of the Beef Board is implemented without first being approved by cattle producers."

Q Is that a true statement?

A I believe it is.

Q So no decision of the Beef Board can be implemented, no message can be sent, or a dollar spent without first being specifically approved by cattle producers, is that true?

A That's not what this statement says. It says that no decision is implemented without first being approved by cattle producers.

Q So, in effect, cattle producers make the decision?

A Subject to USDA approval, yes.

Q And no decision of the Board would be implemented without that approval?

A Again, the statement is no decision of the Beef Board is [247] implemented without first being approved by cattle producers. And then we go on to the next statement that says, "I don't believe this characterization is in any way inconsistent with the extensive oversight USDA provides." That's the USDA approval process.

* * * * *

Q Yes. I read on the second line again that industry contractors formulate proposed checkoff funded projects?

A Yes.

Q Is that true?

A It is.

Q So the proposals are formulated by private beef industry contractors, correct?

A By organizations defined in the Act and Order.

Q Not by—

A That's not for profit national beef industry-governed organizations that were established at the time of the Act and Order.

Q The government doesn't formulate the project?

A Not normally. The government may indicate, as they've done in the case of safety research, the BSE issue that I mentioned earlier, that they would like to see certain [248] projects developed.

* * * * *

Q At this time was Mr. Heinze an employee of the NCBA?

A Yes.

Q Why is the contact person for a Cattlemen's Beef Board press release Lynn Heinze who is a member of the NCBA?

A He wasn't a member—I don't know whether he's a member of NCBA. He was an employee of NCBA contracting to the Beef Board to do producer communications. At that time we had no communications person on staff at the Beef Board. Today we do.

Q I notice that both you and Mr. Heinze have the same [249] e-mail address.

A Well, we have the same—

Q Beef.org.

A —the same information on the back end of it, yes.

Q Why would a person from the CBB have the same e-mail address as a person from the NCBA when there is this fire wall between them?

A There's an information technology resource available that the Beef Board takes advantage of. That e-mail address that shows mresse does not go directly to me, it goes to my administrative assistant. I have a separate e-mail address.

Q You state down at the bottom in the press release that the checkoff is producer controlled. Do you believe that? The second to the last paragraph.

A Yes.

Q We've talked about the last paragraph, that the CBB is an independent 111 member Board. That's true?

A Yes, it's true that it is independent from NCBA or any of its other contracting organizations or any other industry organization.

* * * * *

[250]

MR. PARSONS: Sorry, Your Honor. Plaintiffs' Exhibit 54.

A Yes, this appears to be a submission that the Beef Board made to a USDA Task Force in response to some recommendations concerning all checkoff programs. This occurred a little over a year and a half ago.

Q About a year and a half ago, and it's correspondence from the CBB to the USDA?

A Yes.

Q I want you to turn to the third page which is marked at the bottom CBB 05855.

THE COURT: 05854, Counsel?

MR. PARSONS: 05855. It would be page 4.

THE COURT: That's the fourth page, okay.

BY MR. PARSONS:

Q Do you see where its says "Industry run program?"

A Yes.

Q The sentence above that, would you read that?

A The sentence reads, "However, let there be no mistake about the fact that cattlemen and importers who pay for this program run this program.

Q Is that a true statement?

A Taken in the context of the entire document, it certainly is.

* * * * *

[251]

* * * * *

Q But this is the CBB telling the USDA, don't you make any mistake about it, it's the cattlemen and the importers who pay for this program and run it, is that true?

A That's what the sentence says.

* * * * *

A "In short, cattlemen and importers run the Cattlemen's Beef Promotion and Research Board."

Q "Policies are established by the Board?"

A "And the Board ensures that these policies are carried out by staff." Do you want me to continue?

Q Why don't I do it. "This is the system that the cattle industry requires to run an efficient and effective operation." Nothing in there about the governments at all, is there?

A Again, let's put this in perspective. This is the Beef Board responding to the government. Wouldn't it be ludicrous for the Beef Board to discuss the fact that there is government oversight? Both the writer [252] and the recipient understand that.

* * * * *

A "'We see USDA's role as protecting the program from mismanagement but not dictating what we do,' said Lyle Gray, chairman of the cattlemen's Beef Promotion and Research Board."

Q Is that a true statement?

A It's a quotation, I'm sure he said that.

Q But the substance, is that something you agree with?

A Again, let's not take it out [of] context. I certainly agree with it. He is acknowledging USDA's role in oversight and part of that role is to protect the program from mismanagement. When he says "not dictate what we do," I think he's acknowledging the fact that it

is a producer led program without obscuring the fact that it is also government controlled.

* * * * *

[253]

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Q Tells us how the checkoff works. And there is an organizational chart. And this was put out by the CBB?

A Yes.

Q Can you tell me anywhere on this organizational chart where the government is mentioned?

A No, I can't. Again, in context, if you look at the letter from Dan Hammond above that chart, the chairman of the Cattlemen's Beef Board, it establishes that in this report is an account of checkoff investments at the state and national level. The chart shows how those dollars flow. They don't go to the government.

Q Plaintiff's Exhibit 71. Can you tell me what that is?

A This appears to have been pulled from the Beef Board's web site and it appears to be verbiage from a brochure that was developed that has an overall description of various checkoff programs.

Q The first paragraph as to what is a checkoff program states that these programs are similar to businesses funded by shareholders, producers, processors, handlers, importers, with a Board of directors that is accountable to the [254] shareholders. Does that say anything about a role for the government?

A That particular paragraph does not.

Q Would the Board of directors for these shareholders essentially be the Beef Operating Committee?

A Again, this is a characterization how these programs, all programs, not just the beef checkoff, are similar to businesses with a Board of directors. I think what they're saying is that there is a similarity between the Beef Board and a Board of directors and just as a Board of directors is accountable for the successful operation of that entity to the shareholders, so is the Beef Board accountable to both the producers who pay the checkoff and the government who oversees the programs.

Q Just on the next page, then, the question is asked, do checkoff programs receive government assistance? The answer is no. Is that true?

A Yes. It goes on to say they're funded by the respective industries, not by taxpayers or government agencies. But it does acknowledge USDA oversight.

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[255]

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Q What is this document?

A This outlines a planning cycle for the beef industry.

Q Talks about the NCBA and CBA leadership?

A CBB leadership.

Q CBB leadership. Joint Industry Budget Committee. The Operating Committee approval. Where on this planning cycle does it ever mention a [role] for the government?

A That's not the purpose of the document to outline the role of the government. The purpose of the document is to outline what needs to happen for various industry organizations in developing a proposal that would go to the government for approval.

Q Plaintiffs' Exhibit 83. What is this document?

A This appears to be a document that we provide to our Beef Board members to help them understand their responsibilities.

Q And what's sentence number 1, what does that say?

A "The Beef Board operates through the direction of Board members."

Q I notice at the bottom it says Wayne Watkinson, legal [256] counsel. Who is Wayne Watkinson?

A Wayne Watkinson is a member of a law firm with which the board, under a memorandum of understanding with the USDA, engages to provide certain advice and counsel.

Q So he, Wayne Watkinson, is the CBB's attorney?

A Actually I think USDA is our attorney, if you will. Wayne does provide counsel on a number of issues.

Q And isn't it true that Wayne Watkinson is also the NCBA's attorney?

A I didn't realize that, if that's the case.

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[257]

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Q Okay. I'll represent to you that Exhibit A is a bundle of documents that the parties have stipulated are advertising and promotion paid for by the checkoff. Does that look to be the case?

A Yes, it does.

Q I'm going to turn to the first page where we have the bendable, stretchable, pulled in all directions modern mom. That's a beef checkoff ad?

A Yes, it is.

Q I want to you look at the copyright on the side and tell me what that says?

A At the very bottom of the ad where it says "Funded by America's beef producers?"

Q Not that, but on the side, horizontal, can you read that?

A Barely. I think it says, "2000 National Cattlemen's Beef Association and Cattlemen's Beef Board."

Q So this is a beef checkoff funded message, correct?

A Yes.

[258]

Q And it's copyrighted by the National Cattlemen's Beef Association? Right?

A The advertising agency has a contract with the National Cattlemen's Beef Association. We are funding the program because we are required by federal law to contract through existing industry organizations. NCBA is acting as an agent for the Beef Board in its relationship to the advertising agency who purchased the copyright in both names, or acquired the copyright in both names.

Q Can a private trade organization copyright what is allegedly government speech?

A I've never been to law school—

Q Okay.

A —and I don't know the answer to that question.

Q That's a good answer.

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[259]

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Q And there it is again, copyright, 1999, NCBA. Are all of the beef checkoff advertising all advertisements paid for with producers checkoff dollars copyrighted by the NCBA?

A No.

Q What's the percentage?

A Well, it would be the same percent as are contracted with NCBA. But, remember, we also have contracts with other organizations. They are required to copyright those things that need to be copyrighted with the ownership interests vested in the Beef Board and through the Beef Board/USDA.

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[260]

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MR. PARSON: About page 7 of 26 C.

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[Q] Is this a CBB document, first of all?

A Yes.

Q "And the people who decide how these dollars are used are producers who pay the checkoff and understand what's [261] best for our state and our business," is that true?

A Yes, I believe it is. Subject, again, to USDA approval.

Q Page 6 of the same exhibit, probably the page right before, "Our beef checkoff . . . producers helping producers." This is a CBB document?

A Yes.

Q "Producers run our beef checkoff. The beef checkoff is effective because the people making the decisions are producers just like us." Is that true?

A Yes. Again, subject to USDA approval.

Q Page 3 of that exhibit, "Your beef checkoff is producer-led." I think you've already testified that that's true?

A I believe I explained that earlier.

Q Then finally page 2 of 26C, "All checkoff-funded programs are budgeted and evaluated by the Beef Board, an independent organization of 111 grassroots volunteers." My question is this:

Is the Beef Board, as you state in this ad, an independent organization of 111 grassroots volunteers or is is it the United States Government?

A Those grassroots volunteers are appointed by the United States Government. You can't separate those two facts.

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CROSS-EXAMINATION

BY MR. BREWERS:

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Q I would again refer you to the demonstrative chart that Ms. McKee drew. One of the things that I don't think has been answered yet is the issue as to what happens with the voluntary payments from the Qualified State Beef Councils that are passed on to the Federation. Do those continue to be under the control of the Cattlemen's Beef Board and follow the legislation created by the Act and the Order?

A Yes, they do. They're subject to the same restrictions as the Act and Order.

Q One hundred percent of those voluntary contributions still must comply with the Act and Order?

A That is correct.

Q And who monitors the progress or the activities to make sure that that happens?

[267]

A The Cattlemen's Beef Board and USDA.

Q Can you tell the Court approximately out of the 50 cents per dollar that the State Qualified Beef Boards are entitled to retain, how much of that do they turn in to the Federation?

A It varies from year to year. In recent years I would say approximately 12 million of the 36 million.

Q So approximately a third?

A Correct.

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[268]

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Q But you have testified to Congress, isn't that right?

A On request, yes.

Q Upon request of whom?

A Of Congress.

Q Does that testimony have to be approved in advance by anyone?

A By USDA.

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Q You also indicated something to the effect that it is your understanding, Cattlemen's Beef Board's understanding, that the Act does not allow disparaging comments about other commodities, is that right?

A That is correct.

Q So it is your understanding, for instance, that a project, a communication type project that is coming through the Cattlemen's Beef Board could not say beef is better than pork?

[270]

A We might believe that. USDA would not allow us to say that with checkoff funded programs.

Q Even if the contractor came in with an authorization request that they were firmly convinced beef is better than pork, they can't say that?

A They cannot say that. They can't even imply that. We have a very specific example where it was not pork, but chicken. Clearly the producers would have loved, USDA wouldn't let us do it.

Q Just tell the Court what that ad was.

A The best I remember, and I don't have it in front of me, the gist of it was something like this:

Ever notice how whenever someone tries to get you to eat something weird they'll tell you it tastes like chicken. Try possum, it tastes like chicken. Have some rattlesnake, it tastes like chicken. Have some armadillo, it tastes like chicken. Beef doesn't taste like chicken. Beef is what's for dinner. It would have been a terrific ad. USDA wouldn't let us do it.

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[272]

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Q I'd ask that you rely upon your own recollect of the testimony.

But when Johnnie Smith was testifying he indicated that he has personally seen examples of where USDA—or, where someone in the early stages of an authorization request has made the comment that this

proposal will never fly because USDA won't let it happen. Does that actually happen?

A Yes, it does.

Q At what stages of the process?

A Usually it's in the developmental stage. A State Beef Council may propose to do something that we become aware of either through reviewing the marketing plan or through another contact even earlier in the developmental stage, and we will provide our perspective on whether or not that's permissible under the Act and Order and the guidelines.

Quite frankly, in some cases State Beef Councils may contact USDA directly. They may not wish to hear our perspective and they want to go directly to the USDA. [273] Certainly does happen.

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REDIRECT EXAMINATION

BY MS. McKEE:

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Q Mr. Reese, I represent to you that this is a copy of a federal regulation and I ask you to direct your attention to the bottom of the first column which is Section 1260.215, Patents, copyrights, inventions and publications. Do you see that, sir?

A I do.

Q Could you read the first sentence of Subsection A that starts at the bottom of the column and continues to the top of the second column?

[277]

A "Any patents, copyrights, inventions or publications developed through the use of funds collected by the Board under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other such uses of such patents, copyrights, inventions, or publications, ensure to the benefit of the Board."

Q Thank you, sir.

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RECROSS-EXAMINATION

BY MR. PARSONS:

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[279]

[Q] Does USDA in that oversight process ever review projects which have been rejected by the Beef Operating Committee?

A They see all of the AR's. Occasionally they will respond. I recall an instance, for example, when the Foreign Agricultural Service suggested that when the Operating Committee had turned down a foreign marketing proposal in a certain region, they indicated

that they had planned to put money into that region and would withdraw those funds unless the Operating Committee reconsidered. The Operating Committee reconsidered at the next meeting and did approve that proposal.

Q Did the USDA revert to the CBB's decision to not adopt it?

A The Operating Committee reversed its own decision after being contacted by USDA.

Q Are you aware of the USDA ever overturning a CBB decision?

A Yes.

Q In that vein?

A In what vein.

Q A decision to reject a proposal.

A The only instance I can recall is the one I just described for you.

[280]

Q But that was the Operating Committee changing its own mind?

A It was the Operating Committee deciding not to fund a proposal, USDA sending a letter to the Beef Board questioning that decision, the Operating Committee then at its next meeting deciding to fund the proposal that it had previously rejected based on the input it had received from USDA.

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EXAMINATION

BY THE COURT:

Q Mr. Reese, I'm sure this is in some of the material, but I have forgotten this, I believe.

What percent of the receipts, the annual receipts, is spent on the average for advertising and public relations to try to sell beef?

A Your Honor—

Q Just a rough estimate.

A Okay. The advertising alone represents over 50 percent of the budget each year. I'd say the total would be on the order of 85 to 90 percent, and I'm excluding from that total the costs for administration, which are limited to five percent and never approach that figure, and the costs for [281] evaluation, USDA oversight, and research, which is not direct promotion of beef.

Q So the breakdown for research would be what, approximately?

A Ten, 12 percent in a given year.

Q And what about for the producer information?

A Normally—that has varied through the years from as high as four million to as low as five hundred thousand. I'd say typically it's about two percent.

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[Volume 3]

[Testimony of Barry Carpenter – Excerpts]

[287]

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BARRY CARPENTER, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. LEV:

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Q Mr. Carpenter, we heard some testimony this morning regarding how members, how individuals end up as members of the Beef Board. Could you tell us, does USDA have any role in that process?

A The Secretary of Agriculture appoints members to the Beef Board.

Q And how does he or she pool people for the Secretary to select the numbers who are appointed to the Beef Board?

A Early in the calendar year the Department goes out with a request seeking organizations that would like to nominate individuals to be on the Beef Board. We receive those applications in. We review them for the criteria that's in the Act and the Order and we certified organizations that meet the criteria.

Q Now, these organizations that the Department certifies, are those the same as the Qualified State Beef Councils we've heard about today?

A No. They are organizations that represent cattle producers in the states that would like to have the opportunity to nominate individuals to be on the Board.

Q And how does that nomination process work?

A We certify these entities in the states. And it ranges anywhere from some states have none right now to, I think, [290] the most right now are 18 different organizations in the state. Depending on the number of vacancies in the state, each entity is entitled to nominate or has to nominate at least a minimum of two if they want to send a nomination in. We do encourage them to caucus with the other groups in the state and send us in a consensus slate. Sometimes that happens and sometimes it doesn't. But ultimately we get at the Department a list of individuals that are being nominated for the open seat on the Board.

Q And you said something about a minimum of two. Does it have a minimum of two names per open seat on the Board?

A That's correct. We expect a minimum of two names for each seat. We many times get more than that because the organizations don't necessarily agree on which two they want to send forward.

Q And then it's up to the Secretary to select from that list of names which individuals to appoint to that seat on the Board?

A We review the applications of each individual person that's been nominated and we do some background checks and then we forward that information along to the Secretary so the Secretary can make a decision.

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[292]

[Q] Mr. Carpenter, we heard testimony this morning from Mr. Reese describing the process by which projects and ads are approved under the Beef Act. And I'd like to ask you a few questions about your office's involvement in that process. As an initial matter, could you describe for us generally the nature of your involvement in that process?

A Well, first of all, it's definitely not a part-time activity. I have one full-time staff person assigned to that responsibility. I have others as necessary. And then myself and my associate are involved again as the situation evolves.

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Q Now, Mr. Reese described a rather elaborate process by which proposals are made, approvals recommended, and finally given. And before we talk about that formal process I'd like to ask you, is your involvement in the development process limited to participation in the formal committee structure that Mr. Reese described this morning?

A Like I said two seconds ago, this is not a part-time activity. We're involved in the activities of the Beef Board every day. Our involvement on the—whether it be a [294] project, whatever activity they're taking on, is a daily involvement. Depending on the substance of it, it could begin as simple as me talking to producers about issues they want to pursue up to getting inquiries

from staff, or the board, or from Qualified Beef Councils.

Q So you have interactions with the Beef Board members and staff outside of the formal process you were talking about this morning?

A Absolutely. That's only a minimal part of my interactions with the Board staff to assure, and with, like, the chairman of the Board, and the Executive Committee. Those are my focal points.

Q You said that's just a minimal part of your interaction. Were you referring to the formal process or to the interaction outside of the formal committee process?

A The formal process is just a minimum part. A few days a year.

Q Mr. Carpenter, could you provide us any examples of the kind of issues that you've addressed in your oversight role outside of the formal committee process that we've been talking about?

A A couple of examples. As I said earlier, I get calls from producers, I get calls from Qualified State Beef Councils. Occasionally they call me with an issue they want to pursue. I find out [295] whether they can do it or not. In fact, if I tell them they can't do, they don't waste their time trying to pursue and develop it further.

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A Excuse me. Can I make a comment on that last question?

Q Absolutely.

A What I described was a—where the Qualified Beef Councils come to me to get something done.

I also have a situation where I do the reverse of that. When the Department has some initiative, which recently we've had initiatives to do outreach to limited resources to [296] minority farmers, and livestock producers, cattle producers. In that case I went to the Qualified State Beef Councils, told them here's the Department's own initiative, I need you to participate in this, and they did.

So there's communication both ways, whether I'm looking for something I need them to do or the reverse of that.

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Q And do you and your staff attend these convention like gatherings where the Beef Board meets?

[297]

A I attend most of them personally, but I always have staff there.

Q And before you attend what kind of involvement is there in the planning and preparation for these meetings on USDA's end?

A Well, to the extent it involves projects, authorization requests, the agenda items, all of those are provided to us in advance of the meeting. My staff looks at them, we try to identified things that we may have concerns about. If we do see things we have concerns about, we go back to the staff, or the Board, or whoever is the appropriate target to go back and gets things changed and get those fixed before the meetings ever start.

Q And are those concerns generally fixed prior to the meetings if you raise them?

A If I raise them, they're always fixed.

Q And can you describe for us the nature of you and your staff's involvement at the meeting?

A In the meetings we are—again, we have the script, if you will. We know what the agenda is and we know what the issues to be discussed are. We actively listen to what's going on in there. As they move through certain issues we track those. If we see a problem where they're going, and they're approaching making a decision that ultimately I'm going to have to disapprove, then we step in and put them [298] back on course.

Q And is your participation at these meetings limited to speaking up at the meetings themselves?

A No. Actually most of the adjustments I have to make to the activities are done in a more individual setting with key members of the groups. I may pull the chairman of the Board aside and point out some issues I have concerns with, or maybe individual members that are trying to pursue a certain issue that I know can go nowhere, I get them aside and say, you know, that's a good idea, it's a good thing to do, except you can't do it with checkoff dollars. And then I don't have to take a major role and use part of their time in the debate process of where they're going with checkoff dollars.

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[299]

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Q And in terms of the subject matter, what kind of issues—is there any principle on what kind of issues it is you would raise with the Board?

A Well, clearly anything they are contemplating doing that's not consistent with the Act and Order is obviously something that is a nonstarter. And, then, if the department has some major initiatives that we are trying to pursue, that's my opportunity to take advantage of that resource to try to pursue them.

Q And can you provide the Court with some examples of the kind of issues that you've spoken up on or corrected the Beef Board to pursue?

A It obviously depends on what's going on in U.S. agriculture. But most recently areas dealing with food safety, animal diseases, like hoof and mouth disease, BSE, exports. Recently there was a problem with BSE in Japan that had a devastating impact on our exports there on beef. The Department was very concerned about that, we wanted to use every possible resource at our disposal to try to make an impact there. I conveyed that to the Board.

[200]

Those are the kinds of things. When an issue that the Department is trying to pursue.

Q And the kinds of things you mentioned on food safety issues, what you're saying is if you want funds spent on those issues you tell that to the Board?

A I tell the Board I expect them to endorse the Department's initiatives and to use their resources to address those.

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[302]

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Q And, in your experience, when the Department expresses displeasure at an Operating Committee decision not to fund something, the Operating Committee typically follows the Department's request?

A Certainly every time I've done that they've followed the direction I've given them.

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[304]

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Q And if you had a serious concern, if you had a real issue to which direction the board was taking, where would you raise that concern typically?

A One of two ways. I would either do it during the executive session of the Executive Committee, or I would bring the officers into my office and have a very frank discussion with them.

Q So you wouldn't raise those kind of issues at a full Beef Board meeting?

A That's really not my style. No different than what I do [305] with other employees of the Department, other individuals I manage. I prefer to do those type of things in what I consider an appropriate setting.

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[Q] Can you tell us what happens once a project has been approved by the Operating Committee and the Executive Committee?

A Once it has been through that part of the process, I get a letter from the Beef Board seeking my approval of whatever it is, project, contract, whatever the issue is. When I get it, my staff again goes through it to make sure it is, in fact, what we expect it to be. Remember, we've been involved in this from its inception. We review it, make sure it's what it's supposed to be. If I need to bring in the General Counsel's office to look at it, I do. If I need [306] to bring in my financial officer, I do. But ultimately I approve the document.

Q And do you generally, in fact, approve most of the projects and other things that are brought to your attention for approval?

A. As I stated earlier, I approve almost everything that gets here. In fact, if I didn't approve it, I would feel somewhere we failed along the way because it should not get to that far in the process without being what I'm going to approve.

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Q Mr. Carpenter, we talked about proposals. Does the process you just described apply to the Beef Board budget as well?

A Yes.

Q What about individual ads, once an authorization request has been approved by the Department and a contractor is [307] hired to carry out the project, do you have any role in overseeing the end product?

A We approve the ads.

Q You approve all the ads?

A We approve the substance and language of all the ads. Obviously if they get a statement, and a simple

one is, obviously, "Beef, it's what's for dinner." That statement may be on the radio, television, on a print ad, it may get put with different pictures. But the substance and the language we do approve.

MR. LEV: I'd like to ask the Clerk to show the witness Defendants' Exhibit 219, please.

BY MR. LEV:

Q Mr. Carpenter, do you recognize this document?

A Yes. It's a letter to the Beef Board from my office disapproving an advertisement.

Q And why was this advertisement disapproved?

A This ad was disapproved because it was disparging to another commodity.

Q And is the ad we're speaking about the one Mr. Reese testified to this morning regarding tastes like chicken?

A Yes, I believe it is.

Q You're using the Department's authority to deprive the American consumers of humorous ads?

A I didn't disapprove it because of the humor. I [308] disapproved it because it's disparging to the other commodity.

Q And are there other instances in which the Department has rejected a specific ad that has been submitted to you for your approval?

A Yes.

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Q Did you make the statement that's attributed to you in the second to the last paragraph of Plaintiffs' Exhibit 56?

A I made a lot of statements that day and this certainly was one of them.

Q And do you believe that statement is consistent with the testimony today regarding the nature of the oversight that USDA exercises over the Beef Board?

A Yes, I do. Two key points. One, I expect them to carry their functions out in a proper manner. And the other thing is that the industry will make decisions. [309] Remember, these Board members, they're on the Board because they're from the industry. They're cattle producers that were nominated by other cattle producers from the state and appointed by the Secretary. They're cattle producers, they're making cattle producer type decisions, but they're doing that under the direction and under the authority given to them by the statute and by the Secretary of Agriculture. So, yeah, I believe this is consistent with what I'm saying.

Q Mr. Carpenter, we've discussed your role in overseeing the development of specific checkoff funded projects and budgets and I would like to speak a little bit about your role in other aspects, your other involvement with the Beef Board. And I guess I'd like to start with the new Beef Board members.

What happens after the Secretary appoints—selects those members from the nominations and appoints them to the Beef Board?

A Well, one of the first orders of business is orientation.

Q And do you participate in that orientation?

A Yes, I'm an active participa[nt] in that orientation each year.

Q And what do you tell these new Beef Board members?

A Well, that's the first opportunity anyone in the [310] Department has to enlighten them to what their new job is. Outline their responsibilities. What they're required to do under the Act and the Order. I discuss things like how changes are made, the regulatory rule making process in order to make a change in the way they do business. I get into some of the fiduciary responsibilities. I give just a general overview of what their responsibilities are and I make it very clear to them that what they do ultimately has to come to me for my final approval or they can't spend the money.

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Q Mr. Carpenter, we heard testimony from Mr. Reese about how the Beef Board contracts out the actual implementation of projects once they have been approved by the Department. Does the Department have any role in reviewing or any [311] kind of oversight role regarding the contracts that the Beef Board enters into?

A Like all the other activities, the contracts have to be approved by the USDA. We look for things like are they contracting with an organization that is allowed by the Act and the Order. And we look at the substance of the contract. Again, to the extent that I need General Counsel to look at it, they do. If I need financial people to look at it, they do. And ultimately if I approve it they can enter into the contract.

MR. LEV: I'd like to ask the Clerk to please show Mr. Carpenter what's been marked Defendants' Exhibit 239, please.

BY MR. LEV:

Q Mr. Carpenter, do you recognize this document?

A Yes, I do.

Q And can you tell us what it is, please?

A It's a letter to me from Monte Reese of the Beef Board asking for authority to contract with the U.S. Meat Export Federation.

Q And why was Mr. Reese seeking your approval to contract with the Meat Export Federation?

A Because, I think as I just stated, they can't contract with anyone without my approval.

Q Was there a particular concern with the Meat Export [312] Federation at that time?

A Actually there has been. One of our required internal audits of that contractor raised a concern over their internal controls. And I told the Board they could not contract with them until those were resolved to my satisfaction. And that's what this letter is all about.

Q And, so, that applies with respect to any Beef Board contractor, they have to have in place mechanisms to make sure that the money they get for checkoff projects are only spent in executing checkoff projects?

A That's correct.

Q Mr. Carpenter, I'm about to turn to another area. Could you sum up for us what your view is about your

role in the process we've just been discussing regarding approval of projects?

A Well, I'll sum it up as best I can.

My role begins with when the idea surfaces, whether it surfaced from me or from a grassroots producer. And ends when a project contract authorization request is on my desk [313] and I ultimately approve it or disapprove it. If I approve it, they can spend the money. If I don't approve it, they can't spend the money.

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[314]

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Q And what kind of oversight is exercised over the Qualified State Beef Councils' expenditure of those funds?

A All these dollars are collected under federal statute and they all have the same restrictions. They're expected to spend those funds consistent with the Act and the Order.

Q And what steps are taken to ensure that they, in fact, do spend those funds consistent with the Act and the Order?

A Well, we've directed the Beef Board to provide oversight. They're required to provide a marketing plan each year. And also require them to have an audit each year, a financial audit.

In addition to that, we directed the Beef Board to do periodic reviews of their programs to make sure, in fact, they are carrying out the marketing plans as required.

Q And does USDA review any of those materials?

A We review all of the reviews that are done by the Beef Board and we review the financial audits on any that raise a concern. Which generally is not a major issue. But when there is a concern we review those. And ultimately before we sign off on any of those reviews they have to be resolved to our satisfaction.

[315]

Q And is the oversight role that the Beef Board exercises over the Qualified State Beef Council, are the marketing plans, and the audits, and the reviews just discussed, are those issues discussed by the Executive Committee of the Beef Board?

A Most all of those audits and reviews are discussed in executive sessions of the Executive Committee.

Q And do you or somebody from the Department attend all those executive sessions of the Executive Committee?

A Yes, we do.

Q Mr. Carpenter, you've described for us how you conduct orientation sessions for new members of the Beef Board and how you will be conducting orientation sessions for new members of the Operating Committee.

Do you conduct any orientation sessions for members of the Qualified State Beef Councils?

A I participate in the training sessions for Qualified State Beef Councils. Periodically the Board brings them together for training and I take that opportunity to make sure the Qualified State Beef Councils are aware of what the requirements are. And I was pleased yesterday to hear one of the prior witnesses make

reference to that. It means my training has been effective.

Q Mr. Carpenter, what about the ads that are produced by the Qualified State Beef Councils, what kind of oversight [316] does USDA exercise over the contents of those ads?

A If the state wants to enter into any brand advertising, those have to be approved in advance. The majority of the state advertising is an offshoot of the common theme that's been developed at the national level and actually we—I review and approve all those.

Q And let's say there's some ad that's out there that somehow doesn't match up with the national program and you saw it, what would you do?

A First of all, if it was an ad that was consistent with the Act and the Order, we wouldn't do anything. If we have some concerns about the ad we'd either probably, first of all, contact the Beef Board to activate their oversight. And depending on what it was, I may call them directly and take care of the issue. I can't think of a particular—I can't think of a case where that happened necessarily, but if it did, I would take whatever action is appropriate.

Q And if there was an ad that you thought violated the Act and the Order would you order the end of the publication if you thought inappropriate?

A Oh, absolutely. In fact, depending on the significance of it I may also require them to recou[p] the funds they've spent on the ad.

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Q Mr. Carpenter, you mentioned the Federation and that reminded me of one other question that I wanted to ask you and that is, does the Department ever review any of the audits of NCBA that Mr. Reese testified to this morning?

A We review all the audits of the major contractors.

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Q Are you familiar with the Department of Agriculture's grading programs?

A I'm very familiar. That's where I started my career and I currently manage that program.

Q And can you describe for us what impact, if any, that program has on the market for beef in America?

A We grade about 95 percent of all the steers and heifers slaughtered in the United States. And those grades are the primary factor in determining the price that's paid for those livestock.

Q The program is voluntary, isn't it?

A From a regulatory standpoint it's voluntary. From a market standpoint I would argue if you want to come close to getting full market value for your livestock you better have them graded.

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[326]

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CROSS-EXAMINATION

BY MR. HEIDEPRIEM:

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[327]

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Q Would you make checkoff dollars available for American producers who want to do that?

A Would I make checkoff dollars available for someone who would like to—

Q Identify their product as an American product.

A No. That would be inappropriate use of the checkoff dollars.

Q Why?

A A couple of reasons. First of all, the checkoff dollars are collected on all beef and cattle, including imports. And the focus is to market beef.

Q Well, why couldn't you allow importers the same opportunity to identify their product by their name? You wouldn't be denigrading any particular product then, would [328] you, if you believe they are generically equivalent?

A The statement I made earlier, I think, really explains this. In the U.S. marketplace—the marketplace does not differentiate at this time depending on where the cattle—where the product originates.

For example, when you go to Burger King and you eat a hamburger it doesn't differentiate that two-

thirds of that came from Australia and a third of it came from South Dakota.

Q It may not, Mr. Carpenter. But when you go to the grocery store and you look at a sirloin steak you don't know where that comes from, do you, today?

A You know, based on the label, that it has come through the U.S. inspection system. And if it's been graded, which it probably has, it's going to be labeled with the U.S. grade.

Q Not my question.

My question is, do you know where that sirloin steak came from?

A I personally don't have any idea where it came from.

Q Is it your testimony that to the consumers in country it is no different than buying a hamburger at Burger King, to shop for that sirloin?

A Would you ask me that again, please?

Q Do you believe there is no difference to the consumer in [329] this country whether they're buying a hamburger at Burger King or shopping for a sirloin steak in terms of the information available about where that meat came from?

A First of all, I don't necessarily profess to be an expert in consumer attitudes. But I believe what the marketplace has demonstrated, there's no demand for that.

Q Let me back up, then. Mr. Carpenter, do you believe, as a general rule, that American raised beef is a better product than foreign imported beef?

A The quality of the beef is not a function where it was born. Quality of the beef is a function of its [inherent] characteristics.

Q Is your answer to my question, no, that you do not believe American raised beef is better, as a general rule, than foreign imported beef?

A I don't believe you can make it—the comment in that regard. I don't think you can say all American beef as compared to all imported beef. Each animal is an individual, each one has gone through different management practices to get there, is going to have different characteristics when it hits the marketplace.

Q I'm not asking you if every cut of beef ever raised in American is better than every cut of beef raised in any [330] other country. I'm asking you if, as a general rule, you recognize an American beef as a superior product to that of imports from other countries, yes or no?

A If you pick a specific country. If you're comparing it—that's a question that doesn't have a yes or no answer.

Q Well, then, your answer would be, no, you don't recognize an American beef product as, generally speaking, superior?

A Some American products are superior to some imported products from some foreign countries, some may or may not be.

Q You find it impossible to generalize, then, by country? You truly believe that beef products, regardless of country, are generically equivalent, that's your belief?

A I don't believe I said that.

Q You don't believe that?

A I don't believe I said that.

Q What do you believe as to whether beef products from different countries are generically equivalent?

A I think each product stands on its own. If you want to go down a list of products, Croby beef in Japan is far superior to a certain beef steak made from Australia or from the United States. It's product specific, not nationality specific.

[331]

* * * * *

[Q] Would you at least agree with me that American beef products are recognized, as against their foreign competitors, as superior in foreign markets?

A Beef that goes through the USDA grading service and is graded prime or choice is recognized as superior quality beef around the world, if that's what you're looking for.

Q What was the last thing you said?

A I said, if that's the question you're asking me.

Q So would your answer to my question be, yes, that in foreign markets American raised beef is recognized, as against its foreign competitors, as a superior product?

A I'll try to make it clear as I can. U.S. beef that's been graded prime and choice, going into a marketplace that prefers that type of beef, is recognized as superior.

Q And, as it happens, that's the only place where checkoff dollars are used to distinguish American beef from its foreign competitors, true?

A When it goes into the export marketplace part of that message is where, the country that beef came from. It does not distinguish where that beef was born, it distinguishes the country that product was shipped from.

Q Well, hasn't there been testimony in this trial that a [332] portion of checkoff dollars go to develop markets for American beef as distinct from other kinds in foreign countries?

A It's a market program to support and promote U.S. beef in those other countries. That U.S. beef is a product of the U.S. meat inspection system and labeled accordingly.

Q And that's the same beef that you've already told me is recognized as superior, generally speaking, as against its competitors in foreign markets?

A That qualify of beef in that market, yes.

Q So why can't we use checkoff dollars to do the same thing in the United States with the same U.S. beef products as against the same foreign competitors?

A All of the beef in the United States that gets marketed in that category meets those characteristics and is marketed accordingly. When they market prime and choice beef, that beef being marketed for its characteristics and its ability to meet the needs of the consumer.

Q Is it fair to say, then, when you hear the testimony of the plaintiffs in this case that they recognize a specific competitors that, in your opinion, they are wrong?

A I can't speak for what their opinion is. I can tell—

Q Well, you heard their opinion.

[333]

A I heard their opinion. I don't know how they formed their opinion.

Q Okay.

A They might like red ones better than black ones. But if you're trying to get down to the quality of the product—

Q There's no difference?

A —the grading system sorts that out. And once it's sorted out they're indistinguishable.

Q Okay. So if the grading system identifies them as in the same category, in your view they are indistinguishable, they are generically equivalent?

A From a product quality standpoint.

Q So you do think that the plaintiffs who testified that there is a distinct difference were simply wrong?

A Again, I don't know what they're basing it on. I don't think any of them specifically talked about the quality of the product and what U.S. grading cattle they're calling for.

Q Sir, I'm not asking you to judge their basis. I'm simply asking you to describe that the opinion you hold is that they are wrong?

A My opinion is that I don't know what they're basing it on. I'm saying if they were basing it on the quality of the product, and the product is indistinguishable, then I [334] disagree with them. They may have been basing it on something else.

Q Do you understand their desire to want to use beef checkoff dollars to promote American made products here at home?

A I heard that very well yesterday, yes.

Q Do you think that's just misplaced on their part?

A I don't—I don't see where there's an opportunity to enhance the marketplace by subdividing a product after being marketed. The objective is to increase the demand for beef.

Q I just have one more question about this grading and quality issue and I'll leave it alone, Mr. Carpenter. But you testified that in those foreign markets where our products, American products, are recognized as superior as distinct from their foreign products, that is true as to products that are graded in the same category, correct?

A Correct.

Q Will you please get it through my head why that's not true here in America? Why it's not true that American products are regarded as superior generally as against foreign competitors which have been graded in the same category?

A The product we export to Japan, for example, virtually the same product that's in our marketplace here. We don't need to tell the people in Japan—or, in the [335] United States that this product is a function of our meat inspection system and our process.

* * * * *

Q Would you agree with me that this reflects beef and veal imports into the United States in metric tons

in 1996 was 940,000 metric tons? Would you agree with that?

[336]

* * * * *

Q Okay. 940,000 metric tons of beef and veal imported in the United States that year, correct?

A Yes.

Q That figure rose to 1,063 in 1997, correct?

A That's correct.

Q Continued to increase until 2001 of 1,397, which would be 1,397,000 metric tons, correct?

A Well, the last number is forecasted. But, yes, that's correct.

Q So in the last five years—or, according to this chart, from 1996 when it was 940, it grew to 1397, or approximately 1400 projected for 2001, right?

A That's correct.

Q So you would agree with me that imports have grown over the last five years by the margin indicated in this chart?

A I have no reason to believe this chart is not accurate, that's correct.

* * * * *

[337]

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Q Imports, 1.2 billion up to 2.4 billion generally. Would that be accurate, as far as you know?

A I don't know—I don't know, I don't control this organization that put this together, but I have no reason to question that number.

* * * * *

[Q] Mr. Carpenter, I think we can agree generally that imports are increasing and have increased steadily over the [338] years, correct?

A I think you can.

* * * * *

[340]

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Q In other words, the consumption per capita in the United States of beef has declined those years since the inception of the beef checkoff?

A Correct.

Q And importation of beef products into the United States that shrinking consumption per capita has increased?

A Based on the previous chart I looked at, yes.

Q If you were an American producer of cattle wouldn't that concern you?

A I'm not an American producer of cattle. But I think I would look at it a little broader than that.

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[341]

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Q You don't remember that they expressed a specific concern to you about conflict of interest

between the policy element of NCA and the promotion side, which was the National Livestock and Meat Board?

A I don't remember the specific concern. But certainly control of checkoff dollars and how they get spent was a personal concern of mine.

Q But the merger went ahead anyway, didn't it?

A The combination of the Federation and NCA continued and became NCBA, yes.

Q Right. NCBA was created out of this merger in '95 or '96, right?

A I believe those dates are correct.

Q And wouldn't you agree with me that the purpose, or one of the purposes certainly, according to you, of that merger was so that the industry could speak with one voice?

A It had to do with—first of all, you had organizations which were the contractors to USDA—to USDA and the Beef Board. The National Livestock and Meat Board [342] and National Cattlemen's Association, two independent groups, deciding to take some action.

Q Okay. Mr. Carpenter, my question was, at least according to you, wasn't one of the purposes of the merger was so that the industry, the cattle industry could speak with one voice?

A Efficiency, targeting. I would have to see their list from the plan, but that sounds like some of the issues that were certainly being discussed and being counted as valuable ideas.

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[350]

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Q Do you remember telling me the Operating Committee makes decisions on projects that will be funded by the CBB? Do you remember telling me that?

A And I'm not changing that.

Q I thought—

A They make decisions. There's a lot of decisions in the process. I just make the final decision.

* * * * *

[355]

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Q In any event, 10 of the 20 people are members or come through the NCBA, correct?

A They come through the Federation part of NCBA.

* * * * *

[356]

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Q Their positive support is required before any money can be spent out of the checkoff?

A Before a decision is made by that entity and forwarded to the next level and ultimately gets to me it has to get out of that shop. If it doesn't survive there it doesn't make it.

Q And 10 votes doesn't get it out of the shop, does it?

A It's a two-thirds vote.

Q It's a two-thirds vote to survive. You need 14 votes out of the 20 to spend any money, right?

A I guess that's two-thirds, yes.

Q You don't have any power to spend that money, do you?

A Any power to spend it? No.

Q The Secretary doesn't have the power to spend the money—

A No.

Q —does she?

A No.

Q But the Beef Operating Committee, under the statute, has [357] the power to spend that money, correct?

A No. They have the power to identify areas where they would like to spend it.

Q Let me put it a different way. No money can be spent without the positive support of at least 14 members of the Beef Operating Committee?

A That's right. The process can't begin.

* * * * *

Q I want you to read aloud the first sentence of the third paragraph of Plaintiffs' 56, if you would, please?

A First sentence, third paragraph. "We don't second guess the industry's efforts to built a demand for beef."

Q You don't second guess the industry's efforts?

[358]

A To build demand for beef.

* * * * *

Q When you're talking to an industry group in Kansas City, Missouri, you find it desirable to indicate that the industry has control of this process, correct?

A The industry, as appointed by the Secretary, is the primary source of direction and ideas and that's why the Secretary put them on there, he wanted producers. Otherwise he'd of that hired 20 federal employees like me to make the decision.

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[359]

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[Q] The process of making decisions involving the beef checkoff dollars can be characterized as an industry process, or here in this courtroom as a government process, depending on which situation you find desirable?

A I describe it the same any time I talk about it. I doubt you'd ever find a meeting that I ever discussed this issue in that I didn't make it very clear that I had the final approval.

Q Mr. Carpenter, when you say to me we don't second guess the industry's efforts to build demand for beef, you're telling me that's entirely consistent with the testimony you've given us here today under oath about you having final authority over spending that money?

A I do.

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[360]

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THE COURT: Sir, I think I misunderstood your testimony.

I thought you said you had to approve John Smith's name as sent forward by the Federation. And if you hadn't [361] approved that, that John Smith was not a member of the Operating Committee.

A I get them in a package, all of them together. I don't get—

THE COURT: Let me ask my question again.

A I'm sorry.

THE COURT: When the Court asks a question, you want to try to answer it.

A I was trying.

THE COURT: All right. I understood your testimony to be that if John Smith's name came forward from the Federation you have to approve John Smith or he's not a member of the Operating Committee.

A That's correct. But it doesn't come with one name on the list.

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[363]

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Q You take a look at the credentials of the individual to decide whether you think they're qualified to serve on the Beef Operating Committee. Like you were

hiring someone for a job, you look at everything about the person?

A I look at everything that's germane to that statute. Not everything about them. They've got to be a member or an ex officio member of a Qualified State— of the board of directors of a Qualified State Beef Council. Obviously I look to see if that's the case.

Q Okay. Any other requirements than the one you just [364] identified, that the individual is from a Qualified State Beef Council? Is there any other conditions?

A That it came from an election process that we certify.

Q Okay, go ahead, I'm sorry.

A Not specific to the individual.

Q You don't look at any of the individual's credentials specifically, do you?

A What I just identified—

Q If they come from a—

A —their status as a member of the board of directors of a Qualified State Beef Council.

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CROSS-EXAMINATION

BY MR. BREWERS:

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[367]

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Q If you are attempting to determine whether or not a particular promotional activity or campaign meets

the requirements for approval, what are you relying on?

A I'm relying on all of the information that's been compiled as that project is being developed. The experts that were brought in to testify or give presentations about it. The facts they may use to determine whether there needs [368] to be marketing. The whole wealth of information that's generated as that project is developed. I've been privy to that all along as it's presented and developed and then considered.

Q And your agency, then, takes that information, those factual determinations that you can make, and tries to apply those to what you believe, your agency believes is what Congress told you to do?

A That's correct.

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[370]

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Q For the expenditure of checkoff dollars, does the CBB have any authority to contract for promotional activities without USDA approval?

A Absolutely not.

Q Is that specifically stated in every contract?

A I'd have to read the contract to see exactly what's stated in there. But something to that effect is in there, yes.

Q Has the USDA ever taken the position that beef checkoff dollars should be open to anyone who wants to promote messages about the cattle industry?

A No.

Q And although you do not say that a particular person or entity cannot hold certain beliefs, you limit the use of the money generated from the checkoff to programs or campaigns that promote what you interpret to be the congressional intent, is that right?

[371]

A That's correct. We limit the use of funds to those things that are consistent with the Act and the Order.

Q Is the checkoff and this whole process that we've been talking about, is that intended to be a place for individuals to come and air their personal ideologies?

A No, it's not. That's not the purpose of this whole program.

Q Or is it the purpose of the program to allow individuals to say that they prefer choice beef over prime beef?

A No. The purpose of the program—you know, I think it was stated much better than I can probably state it—but it is to increase the demand for beef in general. As well as the overall well-being of the cattle producers.

Q Is the checkoff, at least as USDA has operated it, is the checkoff a place to air the—or, share opposing messages?

A No.

* * * * *

[373]

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Q Are you aware of any enforcement operations that are conducted by USDA in order to force a producer to comply with payments of the assessments?

A Yes. Periodically we have producers who fail to pay their checkoff. We try to convince them to pay with letters that I send them. When that fails, we take appropriate legal action to collect the funds.

Q Are you aware of NCBA or the Cattlemen's Beef Board ever taking actions to specifically enforce payment of the assessments?

A They don't do any enforcement. They begin the process by identifying and communicating with producers who have failed to pay, encouraging them to pay. But when it comes to the specific enforcement they contact me and I initiate the Department's activities to collect whatever funds or penalties are appropriate.

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[374]

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REDIRECT EXAMINATION

BY MR. LEV:

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[376]

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Q Mr. Carpenter, I think there was some confusion regarding the audit status of the Cattlemen's Beef Board and I just want to make sure the record is clear. Is the Beef Board, in fact, audited?

A Yes.

Q And it's audited by an independent accounting firm?

[377]

A That's correct.

Q And those audits are reviewed by USDA?

A Yes, they are.

Q Every single one?

A Every one of them.

* * * * *

[384]

* * * * *

Q I just have a few more questions, Mr. Carpenter.

Mr. Heidepriem asked you about whether something that the Operating Committee decides not to fund could ever be funded with checkoff funds and I believe you answered that would not be possible, correct?

A Correct.

Q But it was also your testimony earlier today that on occasion when there is a project that the Department is [385] interested in seeing funded you, or someone from the Department, will make that know to the Operating Committee, is that right?

A That's correct. I think I mentioned earlier today that those initiatives that the Department of Agriculture is trying to pursue, I'm expected to use every resource available to me to get those carried out. If there's an issue that I think is appropriate use the

checkoff dollars, I bring that to the attention of key participants in the Operating Committee, the Board, the Executive Committee and identify the Department's desire to pursue it.

Q And ultimately the Operating Committee still has to approve such project before it comes to you for final approval, correct?

A That's correct?

Q If you mentioned that you are interested in a particular area, is that approval generally forthcoming from the Operating Committee?

A The issues that I identify, first of all, are not petty issues. They're major issues important to the industry. And the best I can recall, the issues that I've raised have projects come forward for funding.

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[386]

RECROSS-EXAMINATION

BY MR. HEIDEPRIEM:

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[387]

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[Q] I want to talk to you about these 10 members of the Beef Operating Committee that are not appointed by the Secretary, all right?

A Yes.

Q You know the 10 I'm talking about, don't you?

A I do.

Q You do not nominate them?

A I do not not nominate them.

Q You do not vote for them?

A No, I don't vote for them.

Q You do not pick them?

A I don't—no, I don't pick them.

Q What you do involving those 10 is you certify a process. You say, yup, John Smith came from a Qualified State Council and this is an election that was appropriate under the circumstances and, therefore, all 10 are now on the Operating Committee, right?

A I certify the process as you indicated. I determine the eligibility. And if it meets those criteria, then I approve them to be on the Operating Committee.

Q You don't exercise discretion about a preference for a person based on that person's qualifications to be a good Board member, do you?

A The two criteria I just mentioned.

[388]

* * * * *

Q Mr. Carpenter, when you speak of approving a contract forwarded by the Operating Committee or approving a person elected by the Federation as an Operating Committee member, do you do anything more than a ministerial review of compliance?

A Oh, absolutely. I think I indicated earlier, it's a full-time operation. I've got staff and myself involved from the inception of the ideas helping to, as I said, my style, provide them direction, and my solicitation, and

guidance, and steer them through their process. So, yes, I'm certainly more involved than you imply.

* * * * *

EXAMINATION

BY THE COURT:

Q I think I heard you to say in response to a question from Mr. Lev that the fact that consumption of beef was declining doesn't tell us much since everything gets consumed. Is that basically what your testimony was?

[389]

A Yes. Yes, sir, I tried to make that clear.

Q Well, obviously if people aren't buying Buick automobiles then General Motors will stop producing them, won't they?

A That's correct.

Q And, likewise, if the consumption of beef is going down the cattle producers are ultimately going to stop producing them, aren't they, as they fall by the wayside?

A I don't—I'm not an economist. But my opinion would be that in the short term that wouldn't be the impact. But certainly in the long term it would be, yes, sir.

Q Of course, if people stop eating beef altogether there wouldn't be any cattle producers left, would there?

A That's correct.

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[393]

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Q Would you agree or disagree that if the beef checkoff were changed to promote the American people consuming American beef that that might well advance the arguments or the cause of those would favor country-of-origin labeling?

A It very well may. But I'm not sure.

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[394]

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Q What if these people who are claiming that the beef checkoff program should be used to promote the purchase and consumption of American beef just as a selfish interest, in other words, it wasn't based on any rationale, such as, in fact, American beef is better than beef from Canada, or Mexico, or Australia, or whatever, isn't that a belief that someone can hold?

A They can hold that belief. But the way we try to administer these programs is that we don't focus on individual beliefs, we try to focus on something that speaks for everybody.

Q But, in fact, that's probably the reason that the [395] textile industry tried to get "Made in the U.S.A." on their shirts, isn't it, or their trousers or whatever?

A I imagine, yes, sir.

Q Even though there's probably no difference between a white shirt manufactured in Canada or the one manufactured here.

A I think they probably assume that they give more value to that product by doing that.

Q Sure. Because the American consumer might try to act unfairly toward foreign producers.

A That's very possible, yes, sir. Seems to be purely a market driven persuasion. I've had discussions on this for a number of years and it seems always to get back to what is the marketplace willing to pay for.

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[398]

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THE COURT: Please be seated.

I have one other question of Mr. Carpenter before we proceed here, and he is still under oath. Mr. Carpenter, I notice—and you can stay right there, that's fine. Just have a seat there, that's fine.

I notice in this Cattlemen's Beef Board revenues and so forth the interest income for fiscal year 2001 was $980,000. And the projected interest income is $985,000 for fiscal year 2002.

Where are those funds invested to earn that kind of interest?

BARRY CARPENTER: That's a good point, Your Honor.

We require the Board to invest consistent with our policies. The specific places they're invested at, I'd have to go back and research that with our chief financial officer. But our—the Board's chief financial officer meets with our chief financial officer and we lay out the rules on where they can invest. They can't invest in a manner where there's a risk of losing the

money, that's basically the requirement. But the specific locations of the investments—I hope none was with Enron—but I don't [399] now where they are, Your Honor.

THE COURT: Are they, however, required to invest that money as a governmental agency would?

BARRY CARPENTER: Basically, yes, sir.

THE COURT: In U.S. Treasury bonds or notes?

BARRY CARPENTER: They have to invest—

THE COURT: Don't tell me if you don't know.

BARRY CARPENTER: I'll tell you what I know—

THE COURT: All right.

BARRY CARPENTER: —maybe that's not enough to answer your question.

But they have to invest it in the manner we prescribe to them and that's a manner where we don't believe there's any risk in loss.

THE COURT: Well, that could be, perhaps, in a sufficient number of CD's, couldn't it?

BARRY CARPENTER: It could be, yes, sir.

And beyond that, I don't know, you know, the specifics of it. They meet on occasion with our finance officer and look at your investment policy to make sure they're meeting our rules.

THE COURT: If they're earning $980,000, that looks to me like it's close to $50 million in reserves that the Board has. Assuming a two percent return.

BARRY CARPENTER: I think a lot of that is short [400] term investment as the money is coming in

and just a flow of funds as opposed to one set investment. But, again, I'm not certain of that.

THE COURT: Well, even a money market account doesn't earn any more than three percent today, that's for sure. That would be a very good money market account. Most of them are under two. Isn't that right?

BARRY CARPENTER: To the best of my knowledge, yes, sir.

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[401]

[MONTE REESE:]

The Board maintains a $5 million reserve balance and then there may be as much at 20 million that's collected but not yet paid out at any one time. I hope that answers your question.

THE COURT: So the total reserves are how much right now as we sit here today?

MONTE REESE: The reserves are 5 million.

* * * * *

31 (181D)

Supreme Court, U.S.
FILED
AUG 20 2004
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(14) (1)

Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
DOUGLAS N. LETTER
MATTHEW M. COLLETTE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Beef Promotion and Research Act, 7 U.S.C. 2901 *et seq.*, and the Beef Promotion and Research Order, 7 C.F.R. Pt. 1260, violate the First Amendment insofar as they require cattle producers and importers to fund generic advertising promoting the desirability of eating beef.

PARTIES TO THE PROCEEDINGS

The petitioners in No. 03-1164 are Ann Veneman, Secretary, United States Department of Agriculture, the United States Department of Agriculture, and the Cattlemen's Beef Promotion and Research Board. The petitioners in No. 03-1165 are Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones. The respondents in both cases are Livestock Marketing Association, Robert M. Thullner, John L. Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

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In the Supreme Court of the United States

No. 03-1164

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

No. 03-1165

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 335 F.3d 711. The opinion of the district court (Pet. App. 31a-61a) is reported at 207 F. Supp. 2d 992.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on October 16, 2003 (Pet. App. 62a). On January 5, 2004,

[1] Pet. App. refers to the appendix to the petition for a writ of certiorari in No. 03-1164.

Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 13, 2004. The petition for a writ of certiorari in No. 03-1164 was filed on February 13, 2004, and the petition for a writ of certiorari in No. 03-1165 was filed on February 13, 2004. The petitions were granted and the cases were consolidated on May 24, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, is reproduced in the appendix to the petition (Pet. App. 63a-83a). The Beef Promotion and Research Order, 7 C.F.R. 1260.101 *et seq.*, is also reproduced in that appendix (Pet. App. 84a-119a).

STATEMENT

1. The United States regulates the production, processing, and marketing of beef. Federal law establishes a beef inspection program, see 21 U.S.C. 601 *et seq.*; prohibits deceptive marketing and price manipulation, see 7 U.S.C. 181 *et seq.*; mandates price reporting, 7 U.S.C. 1635 *et seq.*; and imposes requirements for organically produced beef, see 7 U.S.C. 6501 *et seq.* The United States Department of Agriculture (USDA) also operates a voluntary system of grading beef that encompasses most beef processed in the United States. See 7 U.S.C. 1621 *et seq.* At issue in this case is another federal beef program—The Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*

a. In the Beef Act, Congress found that (1) "beef and beef products are basic foods that are a valuable part of

the human diet," (2) "the production of beef and beef products plays a significant role in the Nation's economy," (3) "beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and (4) "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as the general economy of the Nation." 7 U.S.C. 2901(a)(1), (2), (3), and (4). Based on those findings, Congress authorized the establishment of "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b). Congress specified that its program would be financed "through assessments on all beef sold in the United States and on cattle, beef, and beef products imported into the United States." *Ibid.*

The Beef Act specifically directs the development of projects and plans of "promotion" and "advertising," "research," "consumer information," and "industry information." See 7 U.S.C. 2904(4)(B). Congress defined "promotion" as "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. 2902(13).[2]

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[2] Congress defined "research" as "studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of beef and beef products, other related food science research, and new product development." 7 U.S.C. 2902(15). It defined "consumer information" as "nutritional data and other information that will assist consumers and other persons

The Beef Act directs the Secretary of Agriculture to promulgate an order to implement the Act's program, 7 U.S.C. 2903, and to conduct a referendum among cattle producers on its continuation within 22 months of the issuance of the order. 7 U.S.C. 2906(a). In 1986, the Secretary promulgated the Beef Promotion and Research Order (Beef Order), 7 C.F.R. Pt. 1260; see 51 Fed. Reg. 26,132, and in 1988, nearly 80% of cattle producers who voted in the referendum approved the order. J.A. 146. The Act authorizes the Secretary to conduct a subsequent referendum on the program's continuation when at least 10% of cattle producers request one. 7 U.S.C. 2906(b).

b. The Beef Act and the Beef Order establish two administrative entities to assist in developing and implementing beef promotion and research projects—the Cattlemen's Beef Promotion and Research Board (Beef Board) and the Beef Promotion Operating Committee (Operating Committee). 7 U.S.C. 2904(1)-(5); 7 C.F.R. 1260.141-1260.151, 1260.161-1260.169. The Beef Board is the larger of the two entities. It has 108 members, each of whom must be a cattle producer or importer. The Secretary appoints Board members based on nominations submitted by state associations that represent cattle producers within their respective States. 7 U.S.C. 2904(1), 2905; 7 C.F.R. 1260.141(b). A person cannot serve on the Beef Board for more than two consecutive three-year terms. 7 U.S.C. 2904(3).

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in making evaluations and decisions regarding the purchasing, preparing, and use of beef and beef products." 7 U.S.C. 2902(6). And it defined "industry information" as "information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry." 7 U.S.C. 2902(9).

The Operating Committee consists of 20 members, ten of whom are elected by the Beef Board from among its members and ten of whom are cattle producers "elected by a federation that includes as members the qualified State beef councils." 7 U.S.C. 2904(4)(A).[3] The federation-elected members must be certified by the Secretary as "producers that are directors of a qualified State beef council." 7 U.S.C. 2904(4)(A). A person cannot serve on the Operating Committee for more than six consecutive one-year terms. 7 U.S.C. 2904(5). The Secretary has authority to remove any member of the Beef Board or the Operating Committee if the Secretary finds that the member has failed to perform his duties properly or that his continued service would be detrimental to the purposes of the Act. 7 C.F.R. 1260.213.

The Beef Act delineates the functions of the Operating Committee and the Beef Board. The Operating Committee is responsible for "develop[ing] plans or projects of promotion and advertising, research, consumer information, and industry information." 7 U.S.C. 2904(4)(B). It also is responsible for "developing and submitting to the [Beef] Board, for its approval, budgets on a fiscal year basis of its anticipated expenses and disbursements." 7 U.S.C. 2904(4)(C). The Beef Board, in turn, is responsible for reviewing and approving the Operating Committee's annual budget and

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[3] A "federation" is "the Beef Industry Council of the National Live Stock and Meat Board or any successor organization," see 7 C.F.R. 1260.112, and a "qualified State beef council" is "a beef promotion entity" that is authorized by state statute or that is "organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the [Beef] Board as the beef promotion entity within such State." 7 U.S.C. 2902(14).

submitting the budget to the Secretary for approval. 7 U.S.C. 2904(4)(C). The Board is also responsible for administering the Beef Order and recommending amendments to it. 7 U.S.C. 2904(2).

c. By statutory directive, the activities of the Beef Board and the Operating Committee are funded by a $1 per head assessment (or "checkoff") on all beef and beef products sold in, or imported into, the United States. 7 U.S.C. 2904(8). The Beef Act prohibits the use of assessment revenues "in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the [Beef] [O]rder." 7 U.S.C. 2904(10). In States with a qualified state beef council, the state council collects the assessment, sending at least 50 cents of every dollar collected to the Beef Board and retaining the rest for activities authorized by the Beef Act, subject to the Beef Board's and the Secretary's supervision. 7 C.F.R. 1260.172; see 7 U.S.C. 2904(8).

d. The Secretary, through the Agricultural Marketing Service in the U.S. Department of Agriculture (USDA), exercises comprehensive control over the activities of the Beef Board and the Operating Committee. The Secretary must approve their annual budget, and they may incur only those expenses that the Secretary finds to be reasonable. 7 U.S.C. 2904(4)(C); 7 C.F.R. 1260.150(f) and (g); 7 C.F.R. 1260.151. The plans, projects, and contracts of the Operating Committee for promotion and research must be approved by the Secretary. 7 U.S.C. 2904(6)(A) and (B); 7 C.F.R. 1260.168(e) and (f). The Secretary may inspect and audit the books and records of the Beef Board and the Operating Committee at any time. 7 U.S.C. 2904(7)(A) and (B). The Secretary is also authorized to conduct such investigations as she deems necessary for the

effective administration of the Act and to determine whether any person has violated the Act or any order issued under it. 7 U.S.C. 2909. The Secretary is further authorized, following an opportunity for an administrative hearing on the record, to issue an order to restrain or prevent a violation of the order, assess a civil penalty of up to $5000 for a violation, and, through the Attorney General, bring enforcement actions in court. See 7 U.S.C. 2908.

USDA exercises approval authority over all advertising materials in advance of their dissemination. J.A. 114, 143, 274-275. Because USDA personnel work closely with the Beef Board and the Operating Committee from the inception of a project to resolve any potential concerns, USDA rarely has had to invoke its authority to block implementation of a project. J.A. 114, 118-121, 261, 275. USDA also reviews the projects undertaken by state associations using assessment funds. J.A. 115, 228-229, 280-281. At times, USDA has instructed the Beef Board, the Operating Committee, and state councils on certain projects the USDA expects them to undertake. J.A. 125-126, 142-143, 270, 272.

e. The Beef Act promotion and research program has been in operation for more than 15 years. In 2003, approximately 57 million head of cattle were marketed in the beef industry in the United States, having a total value of $45 billion. USDA, National Agricultural Statistics Service, *Meat Animals Production, Disposition and Income*, 2003 Summary, at 6, 8 (Apr. 2004); http://usda.mannlib.cornell.edu/reports/nassar/livestock/zma-bb/meat0404.pdf. The transactions generated $82.7 million to support the promotion and research activities of the Beef Board and their state counterparts. *Beef Board Report* at 3, http:/www.beefboard.org/

documents/Tracking2003%Your%Investment%20.2003.pdf. Advertising under the program over the years has included the "Beef. It's What's For Dinner." advertising campaign. J.A. 131. Research under the program has been conducted in such important areas as bovine spongiform encephalopathy or "mad cow disease." See J.A. 131, 226.

There are numerous comparable promotional programs for other agricultural products, including for such major sectors of the agricultural economy as milk, 7 U.S.C. 6401 *et seq.*, cotton, 7 U.S.C. 2101 *et seq.*, and pork, 7 U.S.C. 4801 *et seq.*.[4] States have also created their own promotional programs for agricultural products. See Brief of Texas, *et al.*, as Amicus Curiae at the Petition Stage at 15 & n.19.

2. In December 2000, respondents Livestock Marketing Association, Western Organization of Resource Councils, and several individual cattle producers filed suit against the Secretary, USDA, and the Beef Board, challenging aspects of the administration of the Beef Order. Pet. App.3a-4a. After this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), respondents amended their complaint to allege that the Beef Act and the Beef Order violate the First Amendment to the extent they require cattle producers and importers to pay assessments for generic advertising. Pet. App. 5a. Nebraska Cattlemen, Inc. and several individual producers (private petitioners) intervened to defend the Beef Act and the Beef Order.

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[4] See also 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 4601 *et seq.* (honey); 7 U.S.C. 4901 *et seq.* (watermelon); 7 U.S.C. 7481 *et seq.* (popcorn).

After a two-day trial, the district court held that the Beef Act violates the First Amendment "because it requires [respondents] to pay, in part, for speech to which [they] object." Pet. App. 48a. The court held that generic advertising conducted under the Beef Act is not government speech. *Id.* at 49a-57a. In so holding, the court relied on the fact that the advertising is funded by assessments on cattle producers and importers and not by general tax revenue. *Id.* at 53a-54a. In addition, the court concluded that the Beef Board is composed of private individuals, and that USDA exercises only ministerial oversight of the Board. *Id.* at 54a-55a.

The court did not analyze the Beef Act under the intermediate scrutiny analysis articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563-566 (1980). The court viewed that standard as applying only to "restriction[s] on commercial speech," as distinguished from "compelled funding of speech." Pet. App. 40a. The court also held that the Beef Act could not be sustained under *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), as germane to a broader regulatory scheme. The court concluded that, like the mushroom program invalidated in *United Foods*, "the principal object of the beef checkoff program is the commercial speech itself." Pet. App. 47a. As relief, the district court entered a declaratory judgment stating that the Beef Act and the Beef Order "are unconstitutional and unenforceable," and issued an injunction barring petitioners from "any further collection of beef checkoffs." *Id.* at 60a-61a.

3. The court of appeals affirmed. Pet. App. 1a-30a. The court acknowledged that the "government speech doctrine has firm roots in our system of jurisprudence." *Id.* at 15a. The court reasoned, however, that the doc-

trine protects the government only against challenges to its "choice of content," not against challenges, such as the one in this case, to "the government's authority to compel [persons] to support speech with which they personally disagree." *Id.* at 17a.

The court of appeals next held that *Central Hudson*'s intermediate scrutiny standard provides the appropriate framework for assessing the constitutionality of such compelled funding. Pet. App. 22a. The court did not, however, undertake a conventional *Central Hudson* inquiry. Instead, the court viewed as dispositive under *Central Hudson* the distinction drawn in *United Foods* between compelled funding of advertising that is germane to a larger regulatory program and compelled funding of a program where the principal object is the advertising itself. Finding that the Beef Act program, like the mushroom program invalidated in *United Foods*, falls into the latter category, the court of appeals summarily concluded that the Beef Act does not serve a governmental interest that is "sufficiently substantial to justify the infringement on [respondents'] First Amendment free speech right." *Id.* at 28a. Having found the Beef Act unconstitutional on that ground, the court of appeals affirmed the district court's injunction against the collection of all assessments under the Act. *Id.* at 28a-29a.

SUMMARY OF ARGUMENT

I. The Beef Act establishes a valid program of government speech. Generic advertising under the Act conveys the government's message that beef is desirable to eat, and nothing in the Act prevents individual producers from adding their own advertising messages to that one. The Beef Act also solves a serious collective action/free rider problem—that generic advertising

is necessary to promote the health of an important sector of the economy, but no individual producer benefits enough to justify paying for advertising on which other producers would free ride. The First Amendment does not prevent the government from solving that serious problem through a program of government speech.

The First Amendment limits the government's authority to interfere with private speech; it does not constrain the government's own speech. The government may speak either through government officials and entities, or it may transmit its message through private individuals or entities. In either event, the government may say what it wishes without implicating the First Amendment. The Beef Act is constitutional under that government speech doctrine.

Advertising under the Beef Act is government speech because the government controls the content of the advertising. First, Congress itself has specified the central message to be disseminated—that it is desirable to eat beef. Second, Congress has created two entities —the Beef Board and the Operating Committee—to develop and implement specific advertising campaigns that will convey that message. And third, Congress has entrusted to the Secretary of Agriculture ultimate control over the content of the advertising.

The court of appeals held that, while individuals may not object to the content of government speech, they may object to a requirement to fund it. But the government speech doctrine not only permits the government to choose the content of its speech; it also allows the government to raise the money necessary to fund it. The court of appeals' contrary approach would eviscerate the government speech doctrine. Under the court of appeals' novel analysis, persons could not object to

the content of United States Army advertising, but they could seek a refund of the portion of their tax dollars devoted to it. Government could not function effectively if such suits could be maintained.

Even if confined to government speech funded through targeted assessments, rather than through general public revenues, the court of appeals' theory is untenable. The First Amendment is not offended by efforts to pair up expenditures with related streams of revenue. For example, a state university may decide to fund its course offerings through tuition payments by students, rather than general tax revenues, because the students are the ones who will benefit most from the offerings. That funding decision would not empower students to insist on a rebate for course content with which they disagree. That rationale applies equally here. Congress reasonably imposed the costs of the Beef Act program on importers and cattle producers because they are participants in the industry Congress sought to promote and because they most directly reap the benefits of the government's pro-beef message.

The district court's conclusion that advertising under the Beef Act is not government speech in the first place is riddled with legal and factual error. For example, the district court viewed it as important that Beef Act advertising is funded through targeted assessments rather than general revenues. But in deciding whether speech is government speech, the critical question is not the method of funding, but whether the government controls the content of the message, and here it does.

The district court's observation that Beef Board members are private individuals is incorrect. Under *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Beef Board is a government entity for First Amendment purposes, and, when they act in their

official capacities, Board members are government officials. But even if the Beef Board were a private entity, it would not change the analysis because, under the government speech doctrine, Congress is free to enlist private entities to disseminate its message. And that is particularly true here since the Secretary has the final say on what particular advertisements will be disseminated.

The district court's finding that the Secretary engaged in only ministerial review of Board activities is legally and factually in error. The Secretary has plenary authority to decide what advertising will be disseminated, and USDA personnel are deeply involved in particular advertising projects from their inception. Regardless of the precise extent of the Secretary's involvement, however, it remains the case that Congress has specified the central message, and the Secretary is accountable for the particular advertisements that are disseminated. Those characteristics are sufficient to establish that advertising under the Beef Act is government speech.

II. The Beef Act is also constitutional because it satisfies intermediate scrutiny. The Court applies intermediate scrutiny when the government restricts a person from engaging in his own commercial speech. Because a requirement to fund money for commercial speech increases the amount of information available to consumers, the government should have more flexibility to impose such a requirement than to restrain commercial speech. At the very least, however, such a program should not be subjected to a more intense level of review.

Under intermediate scrutiny, the Beef Act is constitutional. First, the Beef Act program serves substantial governmental interests: enhancing the welfare

of a vital sector of the economy, stabilizing the general economy of the country, and ensuring adequate nourishment. Second, advertising under the Beef Act directly serves those interests because it stimulates demand for beef. Third, imposing the costs on those who benefit the most from the program is integral to its success. That method gives the producers a stake in the program, while funding through general venues would have risked undermining the very public support Congress sought to engender, and a voluntary program would have simply highlighted the collective action/free rider problem the legislation is designed to address.

Finally, the Beef Act is carefully tailored to achieve its objective. It does not restrain producers from communicating any message they choose, and it does not require them to ascribe to any particular point of view. Instead, it requires only that cattle producers contribute financially to advertising that promotes the very product that they have chosen to market.

Thus, the Beef Act is constitutional both because it is a permissible program of government speech and because it satisfies intermediate scrutiny. The court of appeals' judgment invalidating the Beef Act should be reversed.

ARGUMENT

I. GENERIC ADVERTISING UNDER THE BEEF ACT IS GOVERNMENT SPEECH AND THEREFORE MAY BE FUNDED THROUGH ASSESSMENTS ON CATTLE PRODUCERS AND IMPORTERS WITHOUT IMPLICATING THE FIRST AMENDMENT

The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." When the government adds its voice to the voices of others, and does not constrain

others from speaking, it does not abridge the freedom of speech. The Beef Act is constitutional under that government speech doctrine. Generic advertising under the Beef Act conveys the government's message that beef is desirable to eat, and nothing in the Beef Act restrains individual producers or anyone else from adding their own distinctive voices to that message or from taking a different point of view. The Beef Act also solves a serious problem—that generic advertising is necessary to promote the desirability of beef and beef products and the health of an important sector of the economy, but no individual producer benefits enough to justify paying for advertising on which other producers would be free riders. The First Amendment does not preclude the government from solving that serious problem through a program of government speech.

A. The First Amendment Permits The Government To Engage In Its Own Speech And To Use Funds It Has Raised To Convey That Speech

1. The First Amendment's Free Speech Clause limits government interference with private speech; it does not place any limit on the government's own speech. Thus, "when the State is the speaker, it may make content-based choices," and "it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995).

That principle applies not only when government officials deliver the message themselves, but also when the government "disburses public funds to private entities to convey a governmental message." *Rosenberger*, 515 U.S. at 833. In *Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991), for example, the Court rejected a First Amendment challenge to a federal statute and implementing regulations that provided for grants to

private organizations to furnish counseling to patients about family planning, but prohibited the use of those funds to counsel patients about abortion as a method of family planning. The Court explained that, within broad limits, when Congress furnishes federal funds to establish a program, it is entitled to define the limits of the program. *Id.* at 194.

Although "*Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech," subsequent cases "have explained *Rust* on this understanding." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) (citing cases). Thus, the Court noted in *Velazquez* that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U.S. 217, 229, 235 (2000), or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.' *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)." 531 U.S. at 541; see also *id.* at 542-543. As *Rust* illustrates, "it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their * * * favored point of view * * * by advocating it officially * * * or by giving money to others who * * * advocate it." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring). Nor does it raise distinct First Amendment problems if the government-funded speakers are given some latitude as to how they chose to further the government's chosen message. See pp. 20-21, *infra*.

In *Rosenberger*, the Court struck down what it found to be a viewpoint-based restriction on the eligibility of a

student organization to receive reimbursement of the costs of its newsletter out of student activity fees assessed against students each semester. The Court concluded that the program in question, which was designed not to subsidize a message the government favored, but rather to promote a diversity of views from private speakers separate from the university, was analogous to a limited public forum established by the government, in which viewpoint discrimination is not permitted under the First Amendment. See 515 U.S. at 830, 833-835. In this case, by contrast, the Beef Act and Beef Order establish a program for the government "itself [to] speak or subsidize transmittal of a message it favors," *id.* at 834, not to encourage a diversity of views by private speakers, as in *Rosenberger*, or to enable a private association, such as a labor union, to engage in whatever speech it might choose independent of any governmental message or approval.

The Beef Act responds to a classic collective action problem that limits private advertising of generic products, like beef. Although all beef producers benefit from generic advertising promoting beef, no individual producer benefits enough to justify paying for advertising on which other producers would be free riders. See J.A. 168. In the absence of government intervention, the concentrated costs and widely dispersed benefits make advertising a generic product economically infeasible for most individual producers. *Ibid.*; see generally M. Olson, *The Logic of Collective Action* 43-48 (1971). Because of the public interest in such advertising, the Beef Act directs government speech to address that serious problem. That has been Congress's rationale for such agricultural commodity promotion programs generally, including the program established by the Beef Act. See 7 U.S.C. 7401(b)(7) ("a generic com-

modity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ"); see also 7 U.S.C. 7401(b)(10) (small producers "often lack the resources or market power to advertise on their own" and "are otherwise often unable to benefit from the economies of scale available in promotion and advertising").[5]

2. Government speech necessarily is paid for by private individuals and entities, some of whom may disagree with the government's message. But such disagreement provides no basis under the First Amendment to silence the government or to excuse those who object from having to share the costs of the program. As this Court has recognized, "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," *Southworth*, 529 U.S. at 229, and that principle applies as much to government speech programs as to other valid government programs. Thus, notwithstanding sincere objections from those who are required to bear the costs, "funds raised by the government [may] be spent for speech and other expression to advocate and defend [government] policies." *Ibid.*; see also *id.* at 234-235. To take just one example, "[a] federal taxpayer

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[5] The government is free under the First Amendment to impose reasonable limitations on the type of private expression—*e.g.*, artistic expression—it will subsidize, even where the private recipients of the subsidies are not conveying a governmental message. See *Finley*, 524 U.S. at 584-587; *id.* at 595-600 (Scalia, J., concurring in the judgment). This case, however, does not involve such a program.

obtains no refund if he is offended by what is put out by the United States Information Agency." *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment).

The principle that the government may spend the money it has raised to support its point of view is critical to the functioning of government. "It is the very business of government to favor and disfavor points of view." *Finley*, 524 U.S. at 598 (Scalia, J., concurring). Accordingly, if every citizen could obtain a refund when the government spends tax dollars to further a point of view with which the taxpayer disagrees, "debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller* v. *State Bar*, 496 U.S. 1, 12-13 (1990).

The absence of First Amendment scrutiny for government speech programs does not leave those objecting to it without recourse. "When the government speaks * * * to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate, and the political process for its advocacy." *Southworth*, 529 U.S. at 235. "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Ibid.* Furthermore, in the present context, if the persons who object are cattle producers, they may seek to obtain the support of the requisite 10% of the producers and request the Secretary to hold a referendum on the question of rescinding the Beef Order. See 7 U.S.C. 2906(b).

B. Generic Advertising Under The Beef Act Is Government Speech Because Congress Specified The Basic Message, Created Two Administrative Entities To Disseminate It, And Vested Ultimate Editorial Control Of The Message In The Secretary Of Agriculture

1. A program involves government speech when the government controls the content of the speech that is disseminated under it. In contrast, when the government funds speech, but allows private parties to determine its content, government speech is not involved. *Rosenberger* demonstrates the importance of the element of control to the government speech inquiry. Because the university's agreement with participating student groups specified that the speech would not be "subject to [the university's] control," the Court held that the program did not involve government speech. 515 U.S. at 834-835. On the other hand, the Court made clear in *Rosenberger* that a university's course offerings do involve government speech because "[w]hen the University determines the content of the education it provides, it is the University speaking." *Id.* at 833.

A program may involve government speech even when the government does not exercise control over the precise words that are used to disseminate its message. For example, in the program at issue in *Rust*, private doctors and other counselors chose the precise words that would be used to advise patients about family planning options. The speech at issue was nonetheless government speech because Congress chose the family planning topics that it would fund and then used private grantees to counsel and transmit information to patients on those topics. *Rosenberger*, 515 U.S. at 833. Similarly, in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 306 (2000), the Court held that an

invocation delivered at school events by a student selected in a school election was government speech for Establishment Clause purposes even though the school did not determine "the particular words used by the speaker." Because the school had established regulations to "confine the content and topic of the student's message" and solicited an "invocation" that would "solemnize the event," the student's religious invocation was properly regarded as government speech. *Id.* at 302-303, 306-307. Thus, when the government establishes the basic message, but gives private parties discretion to choose the words to convey that message, the resulting speech remains government speech.

2. Advertising under the Beef Act is government speech because the government controls the content of the advertising in three significant ways. First, through its definition of the term "promotion," Congress itself has specified the central message that Beef Act advertising must convey—that it is desirable to eat beef. See 7 U.S.C. 2902(13) (defining "promotion as "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the market place"). Congress has further provided that advertising must "take into account similarities and differences between certain beef, beef products, and veal," and "ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment." 7 U.S.C. 2904(4)(B)(i)-(ii). At the same time, Congress has prohibited the use of any funds collected under the Beef Act from being used to "influenc[e] governmental action or policy, with the exception of recommending amendments to the order." 7 U.S.C. 2904(10). Thus, in the Beef Act, even more so

than in the statute at issue in *Rust*, Congress itself has determined the content of the speech to be disseminated.

The conclusion that Beef Act speech is government speech does not, however, rest solely on Congress's specification of the basic message. A second important consideration is that Congress created two entities—the Beef Board and the Operating Committee—to develop and implement specific advertising campaigns that will convey Congress's message that it is desirable to eat beef. Congress's use of statutorily created entities for those purposes reinforces the conclusion that Beef Act speech is government speech.

Indeed, under this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Beef Board is a government entity for First Amendment purposes. In that case, the Court held that an entity is a governmental entity for First Amendment purposes when (1) it is created by special law, (2) it is designed to further governmental objectives, and (3) a majority of the members are appointed by the government. The Beef Board has each of those characteristics. It is created by special law—the Beef Act. It is designed for the furtherance of governmental objectives—to protect an industry that is vital to the national economy and to promote adequate nutrition. See 7 U.S.C. 2901(a)(3) and (4). And the government, through the Secretary, appoints all of the Beef Board's members. 7 U.S.C. 2904(1). Consistent with its status as "an integral part of the Department of Agriculture," the Internal Revenue Service has ruled that the Beef Board is exempt from federal taxation. J.A. 148.

The Operating Committee is created by the same special law as the Beef Board and is designed to further the same governmental objectives. One-half of the

members of the Operating Committee are Secretarial appointees, rather than a majority, 7 U.S.C. 2904(4)(A). But the Secretary may remove *any* member from the Operating Committee if, in the Secretary's judgment, the member fails to perform his duties properly or his continued service would be detrimental to the purposes of the Act. 7 C.F.R. 1260.213. In terms of the capacity to control, that power of removal is significant. "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986). Accordingly, the involvement of the Beef Board and the Operating Committee in developing and implementing Beef Act advertising campaigns further demonstrates that Beef Act speech is government speech.

Congress was not content, however, to leave the dissemination of its message to those two entities. It took the further step of entrusting to a politically accountable Cabinet officer—the Secretary of Agriculture —ultimate control over the advertising that is disseminated under the Act. The annual budget proposed by the Beef Board and the Operating Committee must be approved by the Secretary. See 7 U.S.C. 2904(4)(C), 7 C.F.R. 1260.150(f) and (g), 1260.168(d). Even more important, each particular advertising plan and project proposed by the Operating Committee must be approved by the Secretary. 7 U.S.C. 2904(6)(B), 7 C.F.R. 1260.168(e) and (f). Through that statutory approval authority, the Secretary can exercise editorial control over all advertising and ensure that the advertising disseminated under the Beef Act effectively promotes Congress's central message that it is desirable to eat beef and adheres to the other provisions of the

Act that govern promotional activities. See 7 U.S.C. 2904(4)(B)(i) and (ii).

To the extent the Act permits the involvement of industry representatives within the overall framework of government control of the speech, that private involvement does not raise any First Amendment difficulties. As *Rust* establishes, the government may enlist private actors in disseminating the government's message without rendering the resulting speech private, rather than government, speech. Indeed, it promotes First Amendment values for the government to allow knowledgeable actors in the private sector—the doctors and counselors in *Rust* and the beef producers here—to have a role in shaping and transmitting the government's message in the most effective manner to consumers.

In sum, three structural elements in the Beef Act work together to establish government control of the content of Beef Act advertising: Congress has specified the central pro-beef message; two statutorily created bodies help to develop and implement specific campaigns to disseminate that message; and a politically accountable government official has ultimate control over what is said. Those three statutory features establish that Beef Act speech is government speech as a matter of law.

C. The Court of Appeals Erred In Holding That The Government Speech Doctrine Insulates The Government From Challenges To The Content Of The Government's Speech But Not From Challenges To Assessments That Are Imposed To Fund Government Speech

The court of appeals did not hold that advertising under the Beef Act is not government speech. Rather, it held that the government speech doctrine insulates

the government only from a First Amendment challenge based upon the government's choice of content, not from a challenge to a requirement to contribute to the funding of government speech. Pet. App. 16a-17a. That novel conception of the government speech doctrine is mistaken. The government speech doctrine not only permits the government to say what it wishes; it also permits the government to raise the money to do so. *Southworth*, 529 U.S. at 229.

1. In drawing a distinction between challenges to content and challenges to funding requirements, the court of appeals relied primarily on this Court's compelled funding cases—*Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Keller*, *Southworth*, and *United Foods*. Pet. App. 17a-19a. Those cases, however, do not support the court's cramped view of the government speech doctrine. Indeed, the court of appeals' reasoning would effectively eviscerate the government speech doctrine.

In *Abood*, the Court held that an individual has a First Amendment right to refrain from funding speech to which he objects unless a sufficiently important government interest outweighs the individual's First Amendment interest. Applying that standard, the Court held that individuals could be required to fund a union's collective bargaining activities, but that they could not be forced to fund ideological speech that was not germane to those activities. 431 U.S. at 225-226, 235-236. Because *Abood* involved funds raised to support the speech of a private union, not funds raised to support government speech, the Court's holding necessarily was limited to that private speech context. Indeed, because virtually all government speech is funded by money "compelled" from taxpayers, application of the *Abood* rationale to government speech

would be debilitating. Justice Powell emphasized this point in his concurring opinion. "Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." *Id.* at 259 n.13 (Powell, J., concurring in the judgment).

In *Keller*, the Court held, in reliance on *Abood*, that state bar members could not be compelled to fund ideological speech of the state bar that was not germane to the bar's role in regulating the legal profession or improving the quality of legal services. 496 U.S. at 14. Before reaching that conclusion, however, the Court first held that the state bar was not engaged in government speech. *Id.* at 11-13. *Keller* thus proceeded on the understanding that the government speech doctrine would defeat a First Amendment objection to compelled contributions to support a program of government speech. See *id.* at 13.

In *Southworth*, the Court held that university students may not be required to pay for student speech to which they object unless the university is viewpoint-neutral in its funding of student speech. 529 U.S. at 231-233. Critical to the Court's holding, however, was that the university had "disclaimed that the speech [was] its own." *Id.* at 229. The Court emphasized that "[w]here the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different." *Id.* at 235. The Court added that it had not "held, or suggested, that when the government speaks the rules we have discussed come into play." *Ibid.*

Finally, in *United Foods*, the Court applied the *Abood* principle in invalidating a program of compelled funding for the generic advertising of mushrooms. 533 U.S. at 413. Once again, the Court did not suggest that the *Abood* principle would apply to a program of government speech. The United States in that case sought to defend the advertising program under a government speech rationale. But because it had not raised that argument in the court of appeals, and the court of appeals had not passed on it, the Court declined to reach that issue. *Id.* at 416-417. In sum, the *Abood* principle applies when the government compels funding for private speech, but that principle has no application to government speech.

2. The court of appeals also sought to derive support for its conception of the government speech doctrine from this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977). Pet. App. 19a, 23a n.9. In *Wooley*, the Court held that a State could not require a motorist to display a state motto on his licence plate. The Court relied on its prior decision in *Board of Education* v. *Burnette*, 319 U.S. 624 (1943), which held that a State could not require public school students to recite the pledge of allegiance and salute the flag.

Neither *Burnette* nor *Wooley* provides any support for the court of appeals' conception of the government speech doctrine. A requirement that persons contribute to the costs of a government speech program "does not require [such persons] to repeat an objectionable message out of their own mouths," or "require them to use their own property to convey an antagonistic ideological message." *Glickman* v. *Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 471 (1997). *Burnette* and *Wooley* are therefore "clearly inapplicable" to a pro-

gram such as that established by the Beef Act. *Id.* at 470.

3. Acceptance of the court of appeals' mistaken understanding of the government speech doctrine would have staggering consequences. Under that analysis, the government speech doctrine would insulate a challenge to the content of the speech disseminated by the United States Information Agency, but it would not bar a taxpayer from seeking a refund of the portion of his taxes devoted to that program. Taxpayers could not object to the content of advertising that solicits volunteers for the Armed Services, but they could seek refunds for the portion of their taxes devoted to the advertisements. Countless other refund actions could be brought by those objecting to other government speech programs. Government could hardly function if such suits were permitted. Cf. *United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

4. Even if confined to challenges to targeted assessments, rather than expenditures from general revenue, the court of appeals' novel limitation on the government speech doctrine is untenable. For example, in order to escape a First Amendment challenge, a state university would have to fund its course offerings from general tax revenues, rather than from tuition payments by students. The First Amendment, which prohibits the abridgment of *speech*, does not impose that kind of straightjacket on the tax and fiscal policies of the government. To the contrary, the Court made clear in *Southworth* that "[t]he government, as a general rule, may support valid programs by taxes *or other exactions* binding on protesting parties." 529 U.S. at 229 (empha-

sis added). A decision to impose the costs of course offerings on students does not reflect any purpose to force students to assent to ideas with which they disagree. Instead, it reflects the common-sense notion that the costs of a university's offerings should be borne by those who benefit from them most directly.

That same notion underlies the targeted assessments at issue here. Congress imposed the costs of Beef Act advertising on cattle producers and importers because they are participants in the industry Congress sought to promote, because they are the participants with incentives to free ride in a way that leads to a collective action problem, and because they "most directly reap the benefits of" the government's pro-beef message. 7 U.S.C. 7401(b)(2). Moreover, the sales transactions by producers and importers within the beef industry represent an identifiable, administrable, and well-tailored basis for assessing the costs against that industry as a whole. By contrast, imposing the costs of the program on taxpayers generally would have risked undermining the very support for the beef industry that Congress sought to engender. And, by funding the program through targeted assessments, rather than through general revenues, Congress was able to respect the traditions of an industry averse to receiving something for nothing. See 121 Cong. Rec. 38,116, 31,439, 31,448 (1975).

In any event, Congress's decision to match up a revenue stream to the perceived beneficiaries of the Beef Act as opposed to funding the program through general revenues does not raise any distinct First Amendment problem. Government speech pursuant to the Beef Act would be unobjectionable if funded through the general treasury; it does not become

unconstitutional because the assessments are targeted to those directly affected by the program.

5. Congress's decision to impose the costs of Beef Act advertising on those who most directly benefit from it is firmly grounded in this Court's decisions. For example, in *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989), the Court upheld a requirement that successful claimants before the Iran-United States Claims Tribunal pay a portion of any award to the United States as reimbursement for government expenses incurred in connection with the Tribunal. The Court rejected the argument that the fee was unconstitutional because it was being charged for a service that the claimant was being forced to use. *Id.* at 63. The Court explained that the government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Ibid.*

Persons who engage in expressive activity protected by the First Amendment may also be assessed fees for government services from which they derive a particular benefit. For example, persons have a First Amendment right to use the public streets for communicative purposes, but, in order to offset administrative and law enforcement expenses related to that activity, the government may impose a fee on those who exercise that right. *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941). Similarly, while persons have a First Amendment right to file suit in court to seek a redress of alleged wrongs, *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984), they nonetheless may be required to pay a filing fee in order to offset some of the court's operating costs. *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). And "[n]o one questions * * * that the Government, the operator of the [postal] system, may impose a fee on those who would use the system, even

though the user fee measurably reduces the ability of various persons or organizations to communicate with others." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 141 (1981) (White, J., concurring). A fortiori here, persons who engage in *non-expressive* commercial transactions may be assessed a modest fee to support the costs of a government program that is designed to promote the very industry and transactions in which they have chosen to participate.

Congress's choice of the funding mechanism for the Beef Act program is also consistent with the Court's recognition of Congress's authority to impose an exaction that is tied to the operation of a business, such as the Social Security tax upheld in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Similarly, the Beef Act assessment is consistent with Congress's authority to impose an assessment on the sale of a commodity, such as the tax on the sale of gasoline upheld in *Gurley* v. *Rhoden*, 421 U.S. 200 (1975).

The cases discussed above do not involve assessments to support government speech programs. But given the importance of government speech to the functioning of government, there is no apparent reason why Congress should have less flexibility in deciding how to fund programs involving such speech than it has in deciding how to fund other government programs. Moreover, because the government is uniquely positioned to solve the collective action/free rider problem posed by advertising of generic products, a rule prohibiting targeted assessments to promote generic advertisements would leave that serious problem unremedied unless assessments were levied on all taxpayers.

Respondents may prefer that the government fund Beef Act speech in a different way, or indeed, not at all.

But their recourse is the same that exists for any taxpayer opposed to the government's message—to seek a change through the political process. Respondents may try to convince Congress to terminate the program, or they may try to persuade cattle producers and the Secretary to hold a statutorily authorized referendum on the program's continuation. 7 U.S.C. 2906(b). But they do not have a First Amendment right to force the government to fund the program in a particular way.

D. The District Court's Conclusion That Beef Act Speech Is Not Government Speech Is Based On Erroneous Legal Analysis And Is Not Supported By The Record

The district court did not adopt the court of appeals' novel limitation on the government speech doctrine. It nonetheless rejected the government's reliance on the government speech doctrine because it concluded that advertising and other promotional activities pursuant to the Beef Act are not government speech to begin with. That conclusion rests on erroneous legal analysis and on factual findings that are not supported by the record.

1. The district court concluded that Congress's choice to fund promotional activities under the Beef Act through a targeted assessment rather than through general revenues shows that those activities are private rather than government speech. Pet. App. 53a-54a. But the question whether a program involves government speech depends on whether the government controls the content of the message, *Rosenberger*, 515 U.S. at 833-835; *Sante Fe*, 530 U.S. at 306-307, not on what mechanism the government uses to raise the money necessary to disseminate it. As pre-

viously discussed, the government controls the content of the speech that is disseminated under the Beef Act.

Moreover, to the extent that the nature of the funding is relevant to the government speech inquiry, it reinforces the conclusion that Beef Act speech is government speech. To secure the funding necessary to support the Beef Act program, Congress did not depend on voluntary donations by private actors. Instead, it imposed a mandatory $1 per head assessment on all beef and beef products sold in, or imported into, the United States, 7 U.S.C. 2904(8), and authorized the Secretary to institute administrative or judicial proceedings to enforce the Beef Act and the Beef Order, including their assessment provisions, 7 U.S.C. 2908 and 2909. Thus, just as Congress has assumed responsibility for the content of Beef Act speech, it has also assumed responsibility for ensuring that it is funded.

2. The district court viewed Beef Act speech as private speech in part because it concluded that the Beef Board is composed of private individuals. Pet. App. 54a-55a. That finding is legally incorrect. As previously discussed, under *Lebron*, when an entity is created by special law to serve a public purpose, and its members are government-appointed, the entity is a government entity. Because the Board is created by special law to serve a public purpose and the Secretary appoints all its members, the Board is a government entity, and, insofar as they act in their official capacities, the Board's members are government officials for purposes of the First Amendment.[6]

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[6] The district court's finding that the Secretary engages in "pro forma" "approval" of Board members (Pet. App. 55a) is both legally and factually incorrect. Board members are "appointed by

The district court attempted to distinguish *Lebron* on the ground that it involved the question whether an entity is a governmental entity when it restrains speech, not whether it is a governmental entity when it speaks itself. Pet. App. 53a. But *Lebron* categorically held that the existence of the three specified factors means that an entity "is part of the Government *for purposes of the First Amendment.*" 513 U.S. at 400 (emphasis added). Moreover, the district court offered no explanation for how an entity could transmute itself from a governmental entity to a private entity depending on whether it is restraining speech or speaking. If Amtrak is a governmental entity when it restrains speech, as the Court held in *Lebron*, there is no reason that it would not also be a governmental entity when it promotes rail transportation.

In deciding whether Beef Act speech is government speech, however, it does not ultimately matter whether the Beef Board is a governmental or a private entity. As already discussed, under this Court's decisions, Congress is free to enlist private entities to help promote a government message. *Velazquez*, 531 U.S. at 541-542; *Rosenberger*, 515 U.S. at 893; *Rust*, 500 U.S. at 192-193. Thus, even if the Beef Board were a private entity, Congress could enlist its help in promoting the government's message that it is desirable to eat beef. That is particularly true since the Secretary, rather than the Beef Board, has the final say on what promotional activities will be conducted.

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the Secretary," not approved. 7 U.S.C. 2904(1). The Secretary receives at least two nominations for each position. J.A. 116, 267. And before a final selection is made, applications of the nominees are reviewed and background checks are conducted. J.A. 150, 267.

3. The district court concluded that the Secretary's involvement in the dissemination of advertising under the Beef Act does not support the conclusion that it is government speech because, in the court's view, the Secretary conducts only "ministerial review" of Beef Board activities. Pet. App. 55a. But the Secretary's approval authority is not so constrained. The Secretary has plenary authority to decide whether to approve advertising projects, 7 U.S.C. 2904(4)(C), 2904(6)(A) and (B), and in practice, USDA exercises approval authority over all advertising before it is disseminated. J.A. 114, 143, 274-275. USDA has rejected specific advertising messages, such as one that would have disparaged chicken, J.A. 114, 118, 261, 275, and it has edited particular Board communications. J.A. 114, 119-121. Formal disapproval of Board projects does not occur often. But that is not surprising. USDA, the Beef Board, and the Operating Committee are all charged with furthering the central message of the Beef Act, and USDA personnel work closely with the Beef Board and the Operating Committee on the development of particular advertising projects from their inception. J.A. 111-114, 274.[7]

In any event, regardless of the precise extent of the Secretary's involvement in that process, it remains the case that Congress has chosen the basic message to be conveyed, and the Secretary is accountable for every promotion plan and project because they all must be

[7] The district court based its finding that USDA exercises only ministerial review on a purported admission by a USDA official. Pet. App. 55a. That official, however, made no such admission. To the contrary, he explained the extensive nature of USDA involvement in the dissemination of Beef Act speech. J.A. 111-116, 268-277, 303-304.

approved by her Department. The relevant federal agency in *Rust* did not have *any* prior approval authority or involvement in the development of counselors' communications with their individual patients, yet the Court sustained the constitutionality of that program. The conclusion that Beef Act speech is government speech follows *a fortiori* from *Rust*.

4. The district court similarly erred in relying on certain Beef Board communications that have stated that the Beef Board is producer-controlled, that the Beef Act program is industry-run, and that the Beef Board is accountable to producers. Pet. App. 55a. Those statements do not change the legal characteristics that make Beef Act speech government speech. Beef Board members are drawn from the ranks of cattle producers, and the producers therefore necessarily play an important role in the operation of the Board and in the shaping of the Beef Act program. But Congress's eminently sensible decision to enlist the expertise of representatives of persons who are involved in producing the beef and beef products Congress has chosen to promote—and indeed to condition the continuation of the program on their assent in a referendum, *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939)—serves to lessen not to exacerbate the basis for a claim that the program infringes on the interests of participants in the industry. Moreover, because the Beef Act cures the collective action/free rider problem through prescription of the central message, mandatory assessments, and mechanisms to review the resulting advertising, efforts to involve the industry in other ways is fully consistent with Congress's regulatory objectives and does not raise distinct First Amendment concerns. In any event, it remains the case that Congress has determined the basic message, the Beef

Board is legally a governmental entity under *Lebron*, and the Secretary has the final say on the particular advertisements that will be run.[8]

In sum, the district court's government speech analysis is riddled with legal and factual error. Under the correct legal analysis, Beef Act speech is government speech, and the assessments imposed to support that speech do not implicate the First Amendment.

II. THE BEEF ACT SATISFIES INTERMEDIATE SCRUTINY AND IS CONSTITUTIONAL FOR THAT REASON AS WELL

1. Even if the government speech doctrine did not fully insulate Beef Act assessments from First Amendment challenge, those assessments would, at most, be subject to intermediate constitutional scrutiny. Even in the *Abood* context, where government speech is not at issue, the government may impose assessments to fund speech to which a person objects when the government's interest is sufficiently important to outweigh the interference with that person's First Amendment interest in avoiding the assessment. See 431 U.S. at 222 (holding that compelled funding of union activities "is constitutionally justified by the legislative assess-

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[8] The district court found that Beef Act speech is private speech in part because Beef Act advertisements bear the copyright of the Beef Board and the National Cattleman's Beef Association, rather than USDA. Pet. App. 56a. Under the Beef Act Order, however, all "copyrights * * * developed through the use of funds collected by the Board * * * shall be the property of the U.S. Government as represented by the Board." 7 C.F.R. 1260.215(a). That copyright rule eliminates the district court's concern and reinforces the conclusion that Beef Act speech is government speech.

ment of the important contribution of the union shop to the system of labor relations").

Abood not only involved private speech, rather than government speech; it also upheld funding for activities that implicate a broad range of ideological, moral, religious, economic, and political interests. As the *Abood* Court explained, one employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan;" another employee "might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class;" still another employer "might have economic or political objections to unionism itself;" and another employee "might object to the union's wage policy because it violates guidelines designed to limit inflation." 431 U.S. at 222. Beef Act speech, by contrast, involves the promotion of the very product that the persons assessed have chosen to produce and sell. Because of those differences between the Beef Act and the program upheld in *Abood*, the Beef Act should more readily survive constitutional scrutiny. At the very least, however, it should not be subjected to a higher level of scrutiny.

This Court also applies intermediate scrutiny when Congress prohibits a person from engaging in his own commercial speech. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). In that context, the challenged restriction is constitutional if it (1) promotes a "substantial" government interest, (2) "directly advances the governmental interest asserted," and (3) is "not more extensive than is necessary to serve that interest." *Id.* at 566. That standard does not require a legislature to employ "the least restrictive means" of regulation or to achieve a perfect

fit between means and ends. *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989). It is sufficient that the legislature achieves a "reasonable" fit by adopting regulations "in proportion to the interest served." *Ibid.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Here, Congress has not restrained anyone from engaging in commercial speech. Instead, it has required persons to contribute money to the government's own commercial speech. Because a requirement to provide money for commercial speech increases the total amount of information available to consumers and therefore interferes with First Amendment interests far less than a prohibition on commercial speech, the government should have greater flexibility to impose a funding requirement. That is especially so here because the commercial speech at issue consists of generic advertising of the very products that the persons who pay the assessments have chosen to produce and sell. Those persons could reasonably be determined by Congress to benefit from and agree with the central message of the program—the "desirability of beef and beef products." 7 U.S.C. 2902(13). See *Wileman Bros.*, 521 U.S. at 470 ("since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program"). At the very least, a program that increases the amount of information that is made available to consumers should not be subjected to a more intense level of review than that afforded to restrictions on commercial speech.

2. The Beef Act satisfies intermediate scrutiny. First, the Beef Act advances substantial governmental interests that Congress has specifically identified: enhancing "the welfare of beef producers" and other

members of the $50 billion beef industry, stabilizing "the general economy of the Nation," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 2901(a)(3) and (4). As one court has recognized, the Beef Act was designed to prevent "further decay of an already deteriorating beef industry," which "would endanger not only the country's meat supply, but the entire economy." *United States* v. *Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

Second, advertising under the Beef Act directly advances those important interests. The Court has repeatedly recognized the "immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569; see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001); *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993). The record demonstrates that advertising under the Beef Act has proven effective in stimulating demand for beef. J.A. 170-171. Moreover, there is a collective action/free rider problem that limits the incentive for any one producer to pay for generic advertising for beef absent an assurance that other producers who necessarily will benefit from it will bear an equal share of the costs. Accordingly, absent government intervention, there would be obstacles to generic advertising that the Beef Act directly overcomes.

The assessment provision plays an integral role in advancing the government's interests. The modest assessment on those likely to benefit from generic advertising directly solves the collective action problem by eliminating the possibility of free riding. This Court has recognized the government's "vital" policy interest in avoiding "free riders," *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), and that interest is fully implicated here. Moreover, as already discussed, by

imposing the costs of Beef Act advertising on those who "most directly reap the benefits of" the government's pro-beef message, 7 U.S.C. 7401(b)(2), rather than the public at large, Congress avoided the risk of undermining the very support for the beef industry that it sought to engender from the public. The assessments also serve to give producers a stake in the promotion program and in the performance of their fellow producers who lend their experience and expertise by serving on the Beef Board and Operating Committee.

Finally, the Beef Act is carefully tailored to achieve its important interests. It does not prevent a producer from communicating any message of his own; it does not require any producer to engage in any actual speech; and it does not compel any producer to endorse or to finance any political or ideological point of view. *Wileman Bros.*, 521 U.S. at 469-470; see 7 U.S.C. 2904(10). It requires only that cattle producers contribute financially to generic advertising (and other activities) designed to benefit the beef industry as a whole by promoting the sale of the product that the industry exists to market. And it requires cattle producers to contribute in direct proportion to the degree to which Congress could reasonably conclude that they benefit from the generic advertising and promotion. The Act therefore assures a "reasonable" fit by imposing assessments "in proportion" to the interests served. *Fox*, 492 U.S. at 480. Furthermore, even if the Court were to conclude that the government speech doctrine does not validate the program and its assessment feature under the First Amendment, the substantial degree of governmental involvement in establishing and implementing the program significantly attenuates the nexus between any individual producer or importer who pays the modest assessment on his sales of beef and the

generic advertising that is ultimately disseminated following approval by the Secretary.

The Beef Act also provides opportunities for producers to seek to influence the direction of the program, such as through nominations to the Beef Board, see 7 U.S.C. 2904(1). And, if 10% of the producers wish to end the program altogether, they may ask the Secretary to conduct a referendum on whether the program should be terminated. 7 U.S.C. 2906(b). The Beef Act therefore satisfies intermediate scrutiny.

3. The court of appeals invalidated the Beef Act under intermediate scrutiny. Pet. App. 21a-28a. The court did not, however, independently evaluate whether that standard was satisfied. Instead, it viewed *United Foods* as having held that generic advertising programs do not satisfy intermediate scrutiny. Pet. App. 26a-28a. In *United Foods*, however, the government did not argue that the Mushroom Act assessments could be sustained under intermediate scrutiny, and the Court therefore did not address that issue. 533 U.S. at 410. The court of appeals therefore erred in short-circuiting the intermediate scrutiny inquiry and invalidating the Beef Act in reliance on *United Foods*.

In sum, the Beef Act is constitutional both because it establishes a valid program of government speech and because it satisfies intermediate scrutiny. The court of appeals' judgment invalidating the Beef Act should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
DOUGLAS N. LETTER
MATTHEW M. COLLETTE
Attorneys

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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS NEBRASKA CATTLEMEN, INC., GARY SHARP, AND RALPH JONES

GREGORY G. GARRE
LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder—which impose assessments on beef producers and importers to fund research, education, and promotional activities carried out by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives under the direct supervision and control of the Secretary of Agriculture—are "unconstitutional and unenforceable."

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners in these consolidated cases are Ann M. Veneman (in her official capacity as the Secretary of Agriculture), the United States Department of Agriculture ("USDA"), the Cattlemen's Beef Promotion and Research Board ("Beef Board"), Nebraska Cattlemen, Inc. ("NCI"), Gary Sharp, and Ralph Jones. NCI is a nonprofit association representing Nebraska breeders, ranchers, and feeders, as well as county and local cattlemen's associations. NCI has no parent corporations and has issued no stock.

This case arises out of two appeals consolidated in the Eighth Circuit below: *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2769), and *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2832). Petitioners Ann M. Veneman, USDA, and the Beef Board were appellants in No. 02-2769. Petitioners NCI, Gary Sharp, and Ralph Jones were appellants in No. 02-2832. Appellees in both cases (and respondents here) were Livestock Marketing Association, Western Organization of Resource Councils, Robert Thullner, Johnny Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS NEBRASKA CATTLEMEN, INC., GARY SHARP, AND RALPH JONES

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 335 F.3d 711 and reproduced at 1a in the appendix ("Pet. App.") to the

petition for certiorari filed by petitioners Ann M. Veneman, *et al.* The opinion of the District Court is reported at 207 F. Supp. 2d 992 and reproduced at Pet. App. 31a.

JURISDICTION

The judgment of the Eighth Circuit was entered on July 8, 2003. Pet. App. 1a. On October 16, 2003, the Eighth Circuit denied timely petitions for rehearing en banc. Pet. App. 62a. On January 5, 2004, Justice Thomas extended the time for filing a petition for certiorari to and including February 13, 2004. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *. [U.S. Const. amend. I.]

The relevant provisions of the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901 *et seq.*, and the regulations promulgated thereunder are reproduced at Pet. App. 63a-119a.

INTRODUCTION

This case presents a challenge brought under the Speech Clause of the First Amendment to the efforts of Congress and the Executive Branch to protect the Nation's most important agricultural commodity—beef. In 1985, after previous efforts had failed to alleviate a decades-old crisis in the beef industry, Congress found, *inter alia*, that "maint[aining] and expan[ding] * * * existing markets for beef and beef products [is] *vital* to the welfare of beef producers" and "to the general economy of the Nation," and that it is in the "public interest" "to strengthen the beef industry's position in the market-

place." 7 U.S.C. §§ 2901(a)(1), (2), (4), (b) (emphasis added). Congress's legislative response to those findings—the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*—is the subject of the First Amendment challenge in this case.

The Beef Act requires cattle producers and importers to pay a one dollar assessment (or "checkoff") on each head of cattle sold in the United States to fund research, education, and promotional activities—including generic advertising, such as the award-winning "Beef. It's What's For Dinner" ad campaign. To achieve the Act's important governmental objectives, Congress created two special administrative bodies—the Cattlemen's Beef Promotion and Research Board ("Beef Board") and the Beef Promotion Operating Committee ("Operating Committee")—to carry out a national "coordinated program of promotion and research" under the direct supervision and control of the Secretary of Agriculture. *Id.* § 2901(b).

The Eighth Circuit below declared the Beef Act "unconstitutional and unenforceable" in its entirety on the ground that the First Amendment precludes the imposition of assessments on the sale of cattle to fund generic advertising to increase demand for beef. Pet. App. 28a. That decision is fundamentally flawed. The generic advertising conducted under the Beef Act—prescribed in the first instance by Congress and formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives—is quintessential government speech. Under the government speech doctrine, the generic advertising is therefore not subject to First Amendment scrutiny.

The First Amendment provides that " 'Congress shall make no law * * * abridging the freedom of speech.' " The First Amendment thus limits government interference with *private*

speech; it does not limit the government's *own* speech. As this Court has held, "when [the government] is the speaker or when it enlists private entities to convey its own message * * * it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Likewise, the First Amendment does not limit the manner in which the government may choose to fund its speech—especially here. Under the Beef Act, no one is prevented from speaking out or compelled to express any viewpoint. Producers merely are required to pay a modest assessment—one dollar per head of cattle that may have sold for more than $1,000—to fund promotional and other activities by the *government* which are designed to benefit the beef industry. Thus, no producer's speech is in any way "abridged" within the meaning of the First Amendment.

That does not mean that the promotional activities at issue are beyond *all* challenge. Like any other government program, the Beef Act remains subject to other constitutional constraints, such as the Due Process Clause. Moreover, if any producer disagrees with the government's speech under the Beef Act, it can petition Congress or the Beef Board to change the government's message, or it can lobby fellow producers to terminate the program through the Beef Act's built-in referendum mechanism. But the First Amendment does not give citizens—including beef producers—the right to avoid federal assessments simply because they disagree with the way in which those assessments are spent.

Although it is not necessary for the Court to go beyond the government speech doctrine to dispose of this case, the Eighth Circuit's decision also is erroneous for two additional reasons. First, the Beef Act is constitutional under the traditional test for commercial speech articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). There is no question that the Beef Act—enacted "to strengthen the beef industry's position in the marketplace" and improve "the general

economy of the Nation"—serves substantial governmental interests, and requiring producers to fund generic advertising which directly advances those interests is no more extensive than necessary to achieve those goals.

Second, the Beef Act is constitutional under this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 477 (1997), where the Court held that mandatory assessments to fund generic advertising under a similar marketing program for California tree fruit survived First Amendment scrutiny as "a species of economic regulation." In *United States* v. *United Foods, Inc.*, 533 U.S. 405, 415 (2001), this Court held that mandatory assessments to fund generic advertising under the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act"), 7 U.S.C. §§ 6101 *et seq.*, violated the First Amendment because the generic advertising was "not part of some broader regulatory scheme." Here, by contrast, the generic advertising at issue *is* part of a "broader regulatory scheme" governing the beef industry. Accordingly, as in *Wileman*, the collection of assessments to fund the generic advertising of beef is "simply a question of economic policy for Congress and the Executive to resolve." *Wileman*, 521 U.S. at 468.

For any one of these reasons, the erroneous judgment of the Eighth Circuit should be reversed, and the considered judgment of Congress as to how to protect the Nation's most important agricultural industry should be allowed to stand.

STATEMENT OF THE CASE

The American Beef Industry. The beef industry is the largest sector of the American agricultural economy. Dan Otto & John D. Lawrence, *Economic Impact of the United States Beef Industry* 1 (2001) (*available at* hhtp://www.beef.org). Cattle are produced in each of the fifty States, and the economic impact of their production "contributes to almost every county in the nation." *Id.* Over a million Americans raise cattle and depend on the sale of

beef for their livelihood. *Id.* Millions more "indirectly depend upon beef for their livelihood—farmers who grow grain and other feed for the cattle; factory workers who manufacture machinery, pharmaceuticals and related items used by cattlemen; meat processors who slaughter, pack and transport beef; meat cutters and retail clerks who prepare and sell beef; and many more." H.R. Rep. No. 94-452, at 2 (1975).

In recent years, gross receipts from the sale of cattle have totaled nearly $40 billion annually and have accounted for one-fifth of total agricultural sales. Otte & Lawrence, *supra*, at 1. The production of beef, moreover, has generated approximately $150 billion in additional economic output. *Id.* The United States is also one of the world's largest exporters of beef. More than ten percent of U.S. beef—some 2.6 billion pounds—was exported in 2003. *See* U.S. Dep't of Agric., Release No. 0031.04, *Remarks by Sec'y Ann M. Veneman before House Agric. Comm.* 4 (Jan. 21, 2004).

But the economics alone do not tell the whole story. The American beef industry—older than the Nation itself—has left an indelible mark on this Nation's history and has played a unique role in shaping our national identity. In 1607, cattle arrived at Jamestown along with its settlers aboard the *Susan Constant*. James W. Thompson, *History of Livestock Raising in the United States, 1607-1860* 54 (1942) ("*History of Livestock Raising*"); Jimmy M. Skaggs, *Prime Cut: Livestock Raising and Meatpacking in the United States 1607-1983* 11 (1986) ("*Prime Cut*"). In 1624, the Pilgrims brought cattle—"three heifers and a bull"—to Plymouth Rock. David Wheeler, *The Beef Cattle Industry in the United States: Colonial Origins*, 46 Panhandle-Plains Historical Review, 54, 56 (1973) ("*Colonial Origins*"); *History of Livestock Raising* at 14. Even before America declared its independence, New Englanders had begun producing a surplus of cattle for export. Cattle were driven to slaughterhouses in Boston, New York, and Philadelphia. Salted beef was then

exported to other colonies, the West Indies, and British Guiana, where there was a growing appetite for beef. *Colonial Origins* at 60-61.

As New England became more industrial in the decades following the Revolutionary War, the cattle industry migrated westward in search of open—and, in some cases, free—lands for grazing. *Prime Cut* at 11, 18. By 1800, cattle country had spread to the Alleghenies and the Ohio Valley; by 1860, to Illinois and Missouri; and by 1880, to the Great Plains. *History of Livestock Raising* at 66. In pushing further westward, the cattle industry secured a permanent place in American lore. In the late 1800s, hundreds of thousands of cattle were driven northwards from Texas along cattle trails, including the legendary Chisholm Trail. Cattle were often driven up the trail by "cowboys" and were raised on sprawling ranches. *Prime Cut* at 29-30, 55-56, 58. The allure of the ranching life drew many easterners to the new frontier, including, in 1884, a greenhorn Theodore Roosevelt, who purchased an interest in a ranch and more than a thousand head of cattle in the Dakota Territory. *Id.* at 59. *See* Theodore Roosevelt, *Ranch Life and the Hunting-Trail* (1888).

At the same time that the beef industry was shaping the western frontier, it also began transforming the urban marketplace. It has been said that Chicago grew into a metropolis largely because of the livestock trade. *Prime Cut* at 44. In the early 1800s, Chicago was linked by the Great Lakes and the Erie Canal to the eastern markets; by the end of the century, Chicago had become a hub for the great railroads spiking west. Thus situated, Chicago became home to some of the country's largest stockyards—centralized livestock markets which gave rise to a whole new class of merchants who brokered sales for buyers and sellers, and where cattle are still sold in many parts of the country today. *Id.* at 44-49.

Given its exceptional economic and symbolic importance to the Nation, it is not surprising that the federal government has long taken an active role in promoting the beef industry. In 1862, Congress established the United States Department of Agriculture ("USDA"), regarded as the federal government's first "client-oriented" agency. *Id.* at 80. By the turn of the century, USDA had already established programs designed to help cattle producers control costly diseases and produce meatier and thus more profitable herds. Especially in wartime, the federal government has adopted programs regulating the production and consumption of beef, including programs imposing price controls and other measures to stabilize the beef market, providing financial assistance to producers, and encouraging consumers to ration, often by appealing directly to their patriotism, such as by exhorting Americans (during World War I) to observe "meatless Tuesdays" to ensure a sufficient supply of beef for the troops. *Id.* at 6-7, 80-87, 145-146. Congress has also enacted numerous statutory programs regulating the beef industry that remain in effect today. *See* Part III, *infra*.

The Beef Research and Information Act. In the mid-1970s, the beef industry reached a crisis point in its history. Cattle producers were suffering "widespread losses," H.R. Rep. No. 94-452, at 3, due in part to "soaring feed and production costs" as well as "plummeting market prices." 121 Cong. Rec. 31,436 (Oct. 2, 1975) (statement of Rep. Railsback). The total inventory value of U.S. cattle had dropped from $40.9 billion on January 1, 1974, to $20.9 billion on January 1, 1975. H.R. Rep. No. 94-452, at 3. *See also* 121 Cong. Rec. at 38,114 (Dec. 2, 1975) (statement of Sen. Hruska) (in the past two years cattle producers had lost "between $2.75 and $5 billion"). Some cattle producers went bankrupt; many more were forced to sell their herds and turn to other enterprises. H.R. Rep. No. 94-452, at 3. Still others were forced to reduce their herds through slaughter. 121 Cong. Rec. at 38,005 (Dec. 1, 1975) (statement of Sen. Dole)

("The slaughter of cows, a sure sign of declining productive capacity, has been at a record rate in recent months and could total an unprecedented 11 million head in 1975."). The economic repercussions of the crisis reached "financial institutions, allied industries and the entire economies of many communities." H.R. Rep. No. 94-452, at 3.

"[A]gainst this backdrop of concern," Congress enacted the Beef Research and Information Act—the predecessor of the Beef Act. *Id.* The Act provided for "[a] program of research, producer and consumer information and promotion to improve production, marketing and utilization of cattle, beef and beef products to be carried out with funds derived from producer assessments." *Id.* at 5-6. Although the "major emphasis" of the program was not intended to be "on advertising and paid media promotion," S. Rep. No. 94-463, at 6 (1975), Congress recognized that promotion of beef was important to producers and consumers alike. As one Committee Report explained, "[i]f cattlemen know that consumers will continue to buy beef, then cattlemen will increase production—and both parties will benefit." H.R. Rep. No. 94-452, at 3. The program was to be carried out by a "Beef Board," the members of which would be appointed by the Secretary of Agriculture from nominations submitted by eligible producer organizations. *Id.* at 6. Congress specifically intended that "[f]or purposes of administering the Act, *the Beef Board shall act as an agency of the Department of Agriculture.*" *Id.* at 4-5 (emphasis added).

Because the Act contained a refund mechanism, the program was considered "entirely voluntary." *Id.* at 5. Nevertheless, the program was to go into effect only upon the approval of at least two-thirds of producers voting in a referendum. In 1977, a referendum on the Act was held; although 56.6% of voting producers voted in favor of the referendum, it failed to carry the requisite two-thirds majority. The Act was subsequently revised to require only a simple majority. In 1980, a second referendum was held, but

it, too, failed to pass. Charles E. Ball, *Building the Beef Industry* 231 (1998).

The Beef Promotion and Research Act of 1985. In 1980, American beef consumption dropped to its lowest level since 1965 as beef prices rose and beef became the subject of adverse publicity raising concerns about its safety and nutritional value. *Prime Cut* at 168. By the mid-1980s, cattle producers were facing "the worst market in 17 years." 131 Cong. Rec. 26,452 (Oct. 7, 1985) (statement of Sen. Lott). The Nation's cattle herd had shrunk to a 23-year low, and beef prices were plummeting. *Id.* at 26,529 (Oct. 8, 1985) (statement of Rep. Smith). *See also* H.R. Rep. No. 99-271 (Part I), at 185 (1985) ("Despite decreasing cattle numbers, fed cattle prices are now (summer of 1985) at the lowest point in seven years.").

This time, Congress responded by enacting the Beef Act to "revise[] and strengthen[]" the Beef Research and Information Act. *Id.* at 7. Recognizing that "the production of beef and beef products plays a significant role in the Nation's economy," and that "the maintenance and expansion of existing markets for beef and beef products are vital to * * * the general economy of the Nation," Congress enacted the Beef Act to "strengthen the beef industry's position in the marketplace" through a "coordinated program of promotion and research." 7 U.S.C. §§ 2901(a)(2), (4), (b). To accomplish these "vital" objectives, the Act directed the Secretary of Agriculture to promulgate a "beef promotion and research order" ("Beef Order"). *Id.* §§ 2901(a)(4), 2903(b).

As required by the Act, the Beef Order provides for the establishment and selection of the Beef Board and the Operating Committee to administer the program under the direct supervision and control of the Secretary of Agriculture. *Id.* §§ 2903(b), 2904(1), (4)(A). All the members of the Board are appointed by the Secretary, who receives nominations from importers and certified State organizations repre-

senting producers. *Id.* §§ 2904(1), 2905. The Board elects ten of its members to serve on the Operating Committee, together with ten producers elected by a federation that includes as members qualified State beef councils. *Id.* § 2904(4)(A).[1] The Act provides that the Board shall "administer the order in accordance with its terms and provisions," "make rules and regulations to effectuate the terms and provisions of the order," "receive, investigate, and report to the Secretary complaints of violations of the order," and "recommend to the Secretary amendments to the order." 7 U.S.C. §§ 2904(2)(A), (B), (E), (F). Any Board or Committee member or employee who "fails or refuses to perform his or her duties properly" may be removed by the Secretary. 7 C.F.R. § 1260.213.

The Act specifically provides that the Committee shall "develop plans or projects of promotion and advertising, research, consumer information, and industry information." *Id.* § 2904(4)(B). *All* such plans and projects must be submitted to the Secretary for approval. 7 C.F.R. §§ 1260.168(e), 1260.169. The Committee must also prepare an annual budget for promotion and research activities, which is reviewed and subject to approval first by the Board and then by the Secretary. 7 U.S.C. §§ 2904(2)(D), (4)(C). The Board must also prepare and submit a budget (which includes the Committee's anticipated expenses and disbursements) for the Secretary's approval, and is authorized to incur such expenses as the Secretary deems reasonable. 7 C.F.R. §§ 1260.150(g), 1260.151(a).

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[1] A "qualified State beef council" is an entity organized under state law that conducts beef promotion and research and is recognized by the Board as the beef promotion entity in that State. 7 U.S.C. § 2902(14). The producers elected by the federation must be certified by the Secretary as producers that are directors of a qualified State beef council, and the Secretary must certify that such directors are duly elected by the federation as representatives to the Committee. *Id.* § 2904(4)(A).

With the Secretary's approval, the Committee may enter into contracts for implementing and carrying out the research, education, and promotional activities authorized by the Act. 7 U.S.C. § 2904(6); 7 C.F.R. §§ 1260.168(b), (f). Such contracts must provide, among other things, that the plan or project shall become effective upon the approval of the Secretary, as well as that the contracting party shall make such reports as the Secretary, Board, or Committee may require, and that the Secretary, Board, and Committee may periodically audit the party's records. 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(f). The Board and Committee must maintain such books and records, which shall be available to the Secretary for inspection and audit, as the Secretary may prescribe, and must prepare and submit such reports as the Secretary may prescribe. 7 U.S.C. § 2904(7). The Board and Committee must also submit information to the Secretary as requested, and must give the Secretary notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. §§ 1260.150(m), (o), 1260.168(h), (i).

The research, education, and promotional activities authorized by the Act are funded by assessments—or "checkoffs"—paid by producers and importers in the amount of one dollar per head of cattle sold in the United States. 7 U.S.C. §§ 2904(4)(B), (8). Each person purchasing cattle from a producer is designated a "collecting person" and is required to collect assessments from the producer and remit them to a qualified State beef council (which in turn remits assessments to the Board) or, if there is no qualified State beef council in the State in which the person resides, directly to the Beef Board. *Id.* §§ 2904(8)(A), (B); 7 C.F.R. § 1260.311(a).[2] Assessments paid by importers are collected through the U.S. Customs Service. 7 C.F.R. § 1260.172(b)(1). All "collecting

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[2] A producer who can establish participation in a program of an established qualified State beef council is entitled to a credit of up to 50 cents per head of cattle for contributions to such program. 7 U.S.C. § 2904(8)(C).

persons" must make their records available to the Secretary for inspection, and must file such reports as the Secretary prescribes. 7 U.S.C. § 2904(11).

The Act specifies that the promotion conducted thereunder must "advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." *Id.* § 2902(13). At the same time, the Act expressly prohibits the use of assessments collected by the Board for "influencing governmental action or policy, with the exception of recommending amendments to the order." *Id.* § 2904(10). With the Secretary's approval, the Board may invest such funds, pending disbursement, in certain obligations and interest-bearing accounts. *Id.* § 2904(9). Any patents, copyrights, inventions, or publications developed through the use of checkoffs are "the property of the U.S. Government." 7 C.F.R. § 1260.215(a).

The Beef Order and related regulations were issued by the Secretary in 1986. *See* 7 C.F.R. Part 1260. Within 22 months after the Beef Order was issued, the Secretary was required to conduct a referendum among producers and to continue the checkoff program only if approved by a majority of producers voting in the referendum. 7 U.S.C. § 2906(a). In May 1988, the referendum was conducted and approved by nearly 80% of voting producers. *See* J.A. 146.

Promotion and Research Under the Beef Act. For nearly two decades, the Beef Board and Operating Committee have developed and implemented research, education, and promotional projects in accordance with their express statutory mandate. Promotional activities include generic advertising, such as the "Beef. It's What's For Dinner" ad campaign. Research and education projects have addressed such topics as food-borne pathogens, the proper handling of beef products, nutrition and health, and cattle diseases,

including so-called "mad cow" disease or bovine spongiform encephalopathy ("BSE").

Since its inception, the checkoff program has proven to be a great success. *See, e.g.*, Rod Smith, *Industry Officials See Domino Effect*, Feedstuffs, Aug. 13, 2001, at 1 (program "halted a 20-year beef demand erosion"). As a recent study shows, the program has had "a positive and statistically significant impact on the retail purchases of beef," and "is shown to attract new consumers to the beef market." Ronald W. Ward, *Beef Demand and Its Response to the Beef Check-off* 1 (2001) (*available at* http://www.beefboard.org). Indeed, just this year, the "Beef. It's What's For Dinner" ad campaign was recognized for its effectiveness in increasing consumer demand for beef and awarded an EFFIE, one of the advertising industry's most coveted and prestigious awards. *See Checkoff-Funded Programs Earn Advertising, Marketing Awards: Innovative Campaigns Win Top Honors for Effectiveness*, Checkoff News, May 3, 2004 (*available at* http://www.beefboard.org).

In 2003, the Beef Board spent $26.7 million on domestic promotional activities—including the "Beef. It's What's For Dinner" campaign—accounting for about 54 percent of the Board's total expenses. 2003 Beef Board Annual Report 3 ("Beef Report"). The Board's television and print advertising reached 93 percent of adults aged 25-54 more than 12 times with a cost-per-impression of less than a penny. *Id.* at 6. Print ads appeared in 19 consumer magazines and TV commercials ran more than 1,500 times, with major campaigns centered around the Super Bowl and the summer holiday weekends. *Id.*; *Beef Enjoyment Ad Campaign Reaches Target: 72 Percent of Consumers Who Have Seen Ads Rank Beef As Best Protein*, Checkoff News, Jan. 28, 2004; *Checkoff Shares Beef Messages Through Nation's Media: Program Reaches Combined Circulation of 346.1 Million in One Quarter*, Checkoff News, Jan. 28, 2004. Another $5.1 million in promotional activities—roughly ten

cents of every dollar spent—targeted foreign marketplaces. *See* Beef Report at 3; *Global Marketing Committees Update Producers on Demand Efforts*, Checkoff News, Feb. 6, 2004.

At the moment, the checkoff program may be more vital than ever. On December 23, 2003, a BSE-infected cow was discovered in the United States. The Beef Board immediately responded to the crisis, allocating $1 million in checkoff funds to purchase additional radio ads leading up to the Super Bowl and to finance informational activities designed to educate the public on BSE and the safety of U.S. beef, including the launch of a new website focusing on BSE (www.bseinfo.org). *See Beef Board Approves Additional Funding to Manage BSE Response: Executive Committee Activates $1 Million Crisis Response Plan*, Checkoff News, Jan. 8, 2004; *Checkoff Adjusts Demand-Building Programs In Light of BSE Find: Additional Funds Applied to Nationwide, Key Market Radio Advertising*, Checkoff News, Jan. 19, 2004. The ability to respond swiftly—and *nationally*—to the BSE case has proven critical in maintaining consumer confidence in—and thus demand for—U.S. beef. *See Beef Industry Plan Keeps Consumers Confident in U.S. Beef Safety*, Checkoff News, Jan. 28, 2004.

Despite the overall safety of U.S. beef, the single case of BSE caused the United States to "suffer[] a major trade disruption" with the closing of more than 70 foreign markets to U.S. beef imports. U.S. Dep't of Agric., Foreign Agric. Serv., *Livestock & Poultry: World Markets & Trade* 5 (Mar. 2004). As a result, U.S. beef exports for 2004 are forecast at "just 17 percent of 2003 exports." *Id.* *See also id.* at 1 ("The U.S. share of the world beef market in 2004 is forecast to fall from 18 percent to 3 percent."). Importantly, however, "[l]ower production and *robust consumer demand* are helping to support cattle prices." *Id.* at 5 (emphasis added). The checkoff program—statistically proven to stimulate demand for beef—is thus playing a critical role in ensuring the welfare of the U.S. beef industry during this volatile

period. *See Expanded Beef Marketing Campaign Will Work to Boost Demand*, Checkoff News, Apr. 7, 2004 (announcing national advertising campaign "to address potential increased beef supplies caused by closed export markets for U.S. beef").

Proceedings Below. In December 2000, respondents brought this action challenging the Secretary's implementation of the checkoff program on various grounds. Petitioners Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones—a nonprofit state cattlemen's association and two South Dakota cattle producers who, like the vast majority of their fellow producers, support the checkoff—intervened to defend the checkoff program. On June 25, 2001, while this case was pending, this Court issued its decision in *United Foods*. Respondents thereafter amended their complaint to allege that the use of assessments to fund generic advertising pursuant to the Beef Act violates the First Amendment.

After a two-day trial at which petitioners presented substantial, unrebutted evidence concerning the Secretary's extensive oversight and control of the checkoff program, the District Court issued a decision declaring the Beef Act unconstitutional under the First Amendment. Pet. App. 31a. Among other things, the court rejected the argument that the generic advertising conducted under the Beef Act is government speech. The court acknowledged that "the Board * * * [was] created by statute to further the policy of the United States Congress to promote beef for the purpose of strengthening the beef industry's position in the marketplace," and that "the Secretary must approve the appointment of those nominated." Pet. App. 54a-55a. The court also acknowledged that "all projects are submitted to the Secretary for final approval to spend checkoff funds," and that "USDA employees attend every meeting of the Board, the Operating Committee, and the [Board's] Executive Committee." *Id.* Nevertheless, the court concluded—without citation to the record—that the Secretary's oversight of the checkoff

program is "ministerial" and "pro forma." Pet. App. 54a-55a. The court also found it significant that the generic advertising is funded by assessments on the sale of cattle, rather than general tax revenues. Pet. App. 53a.

The court thus issued an order striking down the *entire* Beef Act and enjoining the further collection of *any* assessments under the Act. Even though assessments collected under the Act are also used to fund research and education projects—activities the District Court itself acknowledged were "unobjectionable"—the court refused to limit its injunction to the collection of assessments to fund promotion, or to limit relief to the five individual respondents found to have standing in this case. Pet. App. 57a-58a.

The Eighth Circuit's Decision. The Eighth Circuit affirmed. The court acknowledged that "[t]he government speech doctrine has firm roots in our system of jurisprudence." Pet. App. 15a. In its view, however, "when the government speaks, it is [not] entirely immune from all types of First Amendment free speech claims." Pet. App. 16a. Rather, the court opined, "when the government speaks in its role as the government, it may be immune from First Amendment challenge *based upon its choice of content*." Pet. App. 16a-17a (emphasis added). In this case, the court observed, respondents "are challenging the government's authority to compel them to support speech with which they personally disagree," and not "the content of government speech." Pet. App. 17a. "The two categories of First Amendment cases—government speech cases and compelled speech cases—are fundamentally different." *Id.*

Because the Eighth Circuit concluded that the government speech doctrine does not apply in cases involving the compelled funding of speech, the court never determined whether the generic advertising conducted under the Beef Act is government speech. Instead, the court purported to "adapt" the *Central Hudson* test to this case, reasoning that, "had the

government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case." Pet. App. 21a-22a. Although the court recognized that this Court did not apply *Central Hudson* in *United Foods*, the court nevertheless concluded that *United Foods* was ultimately dispositive of the *Central Hudson* analysis in this case. *See* Pet. App. 26a-28a. The court thus declared the entire Beef Act "unconstitutional and unenforceable," Pet. App. 28a, upholding the District Court's nationwide injunction enjoining the further collection of *any* assessments under the Act. Pet. App. 29a.[3]

SUMMARY OF ARGUMENT

The First Amendment presents no bar to Congress's efforts to protect the Nation's most important agricultural commodity—beef—through a generic advertising program funded by a one dollar assessment on the sale of that commodity.

A. The government frequently engages in speech to promote particular policies or programs—whether to discourage smoking, support the Armed Forces, or to encourage energy conservation—and when the government does so it does not violate the First Amendment even though tobacco farmers, pacifists, or energy producers may disagree with its message. Like the government's expressive activities to convey the message that smoking is bad and energy conservation is good, the government's promotion of beef pursuant to the Beef Act is government speech, and thus immune from scrutiny under the Speech Clause of the First Amendment.

Under this Court's decision in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Beef Board and Operating Committee are part of the government for First Amendment purposes. The Board and Committee were

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[3] The Eighth Circuit denied timely petitions for rehearing en banc, although two judges voted to grant rehearing, and another did not participate in the matter. Pet. App. 62a.

created by special statute explicitly for the furtherance of governmental objectives. All the members of the Board and half the members of the Committee are appointed by the Secretary of Agriculture, who has the power to remove all members of both. The Beef Act and Beef Order specifically prescribe the content of the speech in which the Board and Committee may engage, and further provide that the specific messages they formulate must be approved in advance by the Secretary. Moreover, as the record in this case reflects, the Secretary exercises extensive oversight and control over all aspects of the checkoff program. Accordingly, the speech those entities engage in pursuant to and under the strictures of the Beef Act is unquestionably *government* speech.

But even if this Court were to conclude that the Board and Committee are not governmental entities under *Lebron*, the generic advertising conducted under the Beef Act would *still* constitute government speech. The government may—and frequently does—use private entities "to convey a governmental message," or "to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833. *See, e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Here, the generic advertising is prescribed in the first instance by Congress and formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives. Thus, it is clear that when the Board and Committee speak, they do so on behalf of the government.

The fact that the generic advertising is financed by assessments on the sale of cattle does not somehow transform the character of that speech from government to private speech. The First Amendment does not constrain the government's ability to engage in speech of its own, whether such speech is funded by general tax revenues "or other exactions." *Board of Regents of the Univ. of Wisconsin Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000). It is well established that the govern-

ment has broad leeway to choose how to fund its programs. Had Congress elected to fund the generic advertising under the Beef Act with general taxpayer dollars, there would be no question that the program's speech is government speech. The constitutional analysis should be no different simply because Congress opted instead to impose a modest assessment on those who, in Congress's judgment, "most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2)—*i.e.*, those who choose to sell the commodity Congress has chosen to promote.

B. Even if this Court were to conclude that the generic advertising under the Beef Act is not government speech, such advertising is still *commercial* speech, and survives First Amendment scrutiny under the test articulated by this Court in *Central Hudson*. First, it cannot be gainsaid that Congress's objectives in enacting the Beef Act—to "maint[ain] and expan[d] * * * existing markets for beef" and thereby improve "the general economy of the Nation," 7 U.S.C. §§ 2901(a)(4)—are "substantial" governmental interests. *Central Hudson*, 447 U.S. at 566. Second, the Beef Act—statistically proven to increase consumer demand for beef—"directly advances" those interests. *Id.* And third, the Beef Act is no "more extensive than necessary to serve" those interests. *Id.* The Act does not compel any person to speak, it does not call for the financing of any political or ideological speech, and it does not prevent anyone from speaking out against the government's message. It simply requires producers and importers to pay a modest assessment to support the *generic* promotion of beef—from which, in Congress's judgment, they all benefit.

C. The generic advertising under the Beef Act is also constitutional under this Court's decision in *Wileman*. There, this Court upheld a similar generic advertising program for California tree fruit because the program was viewed as "a species of economic regulation" and therefore not subject to First Amendment scrutiny. *Wileman*, 521 U.S. at 477. In

United Foods, this Court distinguished *Wileman* on the ground that the mushroom promotion program was "not part of some broader regulatory scheme." *United Foods*, 533 U.S. at 415. Here, by contrast, the generic advertising conducted under the Beef Act *is* part of a "broader regulatory scheme." Like the marketing orders in *Wileman*, numerous statutes regulating the sale and marketing of beef help "establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Wileman*, 521 U.S. at 461. Because the generic advertising under the Beef Act is thus properly viewed as "a species of economic regulation," *id.* at 477, it simply "[does] not raise First Amendment concerns." *United Foods*, 533 U.S. at 415.

ARGUMENT

I. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS GOVERNMENT SPEECH AND IS THEREFORE NOT SUBJECT TO FIRST AMENDMENT SCRUTINY.

1. Like private citizens and corporations, government at various levels regularly contributes its voice to the marketplace of ideas. As the Third Circuit observed in *United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989):

> Citizens' tax dollars purchase a considerable amount of "government speech." Not only does the government speak on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention, each time the President of the United States meets with a foreign dignitary, or state department officials enter into arms control negotiations, the government is engaging in expressive activities on behalf of everyone.

See also Warner Cable Communications, Inc. v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("government

may participate in the marketplace of ideas and contribute its views to those of other speakers") (quotation omitted); *Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 482 (1st Cir. 1989) ("In addition to its role as a regulator, the state plays an important role as a participant in the marketplace of ideas."); *Block* v. *Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) ("[T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate.") (Scalia, J.) (quotation omitted).

The government's speech necessarily is paid for by citizens who may or may not agree with the government's message. That fact, however, provides no basis for preventing the government from taking and communicating a position on issues of public concern, or for any individual to demand the return of his or her tax dollars if he or she happens to disagree with the government's message. *Southworth*, 529 U.S. at 229 (the government may spend "*funds raised* * * * for speech and other expression to advocate and defend its own policies") (emphasis added); *Rosenberger*, 515 U.S. at 833 ("when the government appropriates *public funds* to promote a particular policy of its own it is entitled to say what it wishes") (emphasis added).

As this Court explained in *Keller* v. *State Bar of California*, 496 U.S. 1, 12-13 (1990):

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. * * * If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Indeed, as a practical matter, effective government would grind to a halt if every person had a right to insist that his or

her money not be used to support programs or positions with which he or she professes disagreement. *See Block*, 793 F.2d at 1313 (discussing the "practical problems of excluding the government from ideological debate"); *cf. United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Accordingly, the Speech Clause of the First Amendment simply does not provide a legal basis for objecting to government speech. The First Amendment limits government interference with *private* speech; it does not limit the government's *own* speech. Thus, while the First Amendment ordinarily prohibits the government from regulating speech on the basis of its content, this Court has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Rosenberger*, 515 U.S. at 833 (emphasis added). *See also Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("We have said that viewpoint-based funding decisions can be sustained in instances *in which the government is itself the speaker, or instances * * * in which the government used private speakers to transmit specific information pertaining to its own program.*") (citations and quotation omitted; emphasis added).

To say that government speech is not restrained by the Speech Clause of the First Amendment is not to say that it is totally unassailable. Like any other government action, government programs designed to lend the government's voice to the marketplace remain subject to other constitutional constraints, including the Due Process Clause, the Equal Protection Clause, and even the Religion Clauses of the First Amendment. *See, e.g., Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000). More fundamentally, as in the case of any other government program, the public—through

the democratic process—may call for the end of that program, or insist on a different message. *See infra* at 39 n.8.

2.a. In deciding whether speech is government speech, the first factor to consider is whether the government itself is speaking. In *Lebron*, this Court provided clear guidance for making that determination. That case establishes that entities such as the Beef Board and Operating Committee are government entities for First Amendment purposes. Thus, the expressive activities in which those entities engage pursuant to the Beef Act readily qualify as government speech.

In *Lebron*, the National Railroad Passenger Corporation (better known as Amtrak) refused to allow the display of a political advertisement on a billboard controlled by Amtrak. The question for the Court was whether Amtrak should be considered part of the government for First Amendment purposes. The Court answered that question in the affirmative: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government *for purposes of the First Amendment*." 513 U.S. at 400 (emphasis added).

The three factors that led this Court to conclude that Amtrak "is part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law; (2) furtherance of governmental objectives; and (3) retention of appointment authority—are all present here and compel the same conclusion with respect to the Beef Board and the Operating Committee. *First*, the Board and Committee were each "created by a special statute." *Id.* at 397. *See* 7 U.S.C. §§ 2904(1), (4)(A).

Second, the Board and Committee were created "explicitly for the furtherance of federal governmental goals." *Lebron*, 513 U.S. at 397. *See* 7 U.S.C. § 2904(2) (providing that the Board shall administer the Secretary's Order); *id.*

§ 2904(4)(B) (providing that the Committee "shall develop plans or projects of [beef] promotion"). The Beef Act was accompanied by congressional findings explaining that "the production of beef and beef products plays a significant role in the Nation's economy" and that "the maintenance and expansion of existing markets for beef and beef products are vital * * * to the general economy of the Nation." *Id.* §§ 2901(a)(2), (4). The Act declares it to be the "policy of Congress" and in "the public interest" to carry out "a coordinated program of promotion and research" designed to "strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." *Id.* § 2901(b).

These "governmental objectives" were reaffirmed by Congress with the passage of the Federal Agricultural Improvement and Reform Act of 1996 ("FAIR Act"). *See* 7 U.S.C. § 7401. With specific reference to the Beef Act, *see id.* § 7401(a)(5), Congress found that "[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs." *Id.* § U.S.C. § 7401(b)(1). The promotion programs were found "to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities." *Id.* § 7401(b)(8)(B).

Third, the members of the Board and Committee serve "under the direction and control of federal governmental appointees." *Lebron*, 513 U.S. at 398. The Secretary of Agriculture appoints all the members of the Board, *see* 7 U.S.C. § 2904(1), half the Committee's members, *see id.* § 2904(4)(A), and has the power to remove all members of both, *see* 7 C.F.R. § 1260.213. Moreover, by establishing staggered, three-year terms of appointment for Board members (who may serve no more than two consecutive terms),

see 7 U.S.C. § 2904(3), and one-year terms of appointment for Committee members (who may serve no more than six consecutive terms), *see id.* § 2904(5), the Beef Act assures the Secretary's continuing role in determining the composition of the Board and Committee. This point, too, was emphatically reaffirmed with the passage of the FAIR Act. *See id.* § 7401(b)(1) (generic commodity promotion programs are "Government-supervised"); *id.* § 7401(b)(2) ("supervised by the Secretary of Agriculture"); *id.* § 7401(b)(8) ("under the required supervision and oversight of the Secretary of Agriculture").

In addition, the Act and the Order provide for the Secretary's substantial continuing oversight of the Board and Committee. *All* plans and projects developed by the Committee must be submitted to the Secretary for approval. 7 C.F.R. §§ 1260.168(e), 1260.169. The Secretary must also approve annual budgets submitted by the Board and the Committee. 7 U.S.C. §§ 2904(2)(D), (4)(C); 7 C.F.R. § 1260.150(g). The Committee must also obtain the Secretary's approval to enter into contracts for implementing and carrying out the promotional and research activities authorized by the Act. 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(b),(f). The books and records of the Board and Committee are subject to inspection and audit by the Secretary, and the Board and Committee must prepare such reports as the Secretary may prescribe. 7 U.S.C. § 2904(7). The Board and Committee must also submit information to the Secretary as requested, and must provide notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. §§ 1260.150(m), (o), 1260.168(h), (i).

Thus, under *Lebron*, the Board and Committee are government entities for First Amendment purposes. This conclusion applies with even more force when other aspects of the Beef Act's statutory and regulatory scheme are considered. The Beef Act and Beef Order specifically define the powers and duties of the Board and Committee, *see* 7 U.S.C.

§§ 2904(2), (4)(A)-(C), (6), (7); 7 C.F.R. §§ 1260.149, 1260.150, 1260.167, 1260.168, including the expressive activities in which they may—and may not—engage. For instance, the Beef Act specifically prescribes the content of the speech at issue here—the generic promotion of beef. *See* 7 U.S.C. §§ 2901(b), 2904(4)(B). The Act further specifies that such promotion be directed solely to "advanc[ing] the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." *Id.* § 2902(13). The Act also requires the Board and Committee to "take into account similarities and differences between certain beef, beef products, and veal," and to "ensure that segments of the beef industry that enjoy a unique consumer identity receive fair and equitable treatment." *Id.* § 2904(4)(B)(i)-(ii). At the same time, the Act expressly *prohibits* the use of funds for the purpose of "influencing governmental action or policy." *Id.* § 2904(10).

In short, the Beef Board and Operating Committee are governmental instrumentalities "created to enable the Secretary of Agriculture to communicate [her] message that beef is good." *Frame*, 885 F.2d at 1131. This conclusion is squarely in keeping with Congress's intent in enacting the predecessor Beef Research and Information Act—which Congress specifically intended the Beef Act to "revise[] and strengthen[]," H.R. Rep. No. 99-271 (Part I), at 7—that, "[f]or purposes of administering the Act, *the Beef Board shall act as an agency of the Department of Agriculture.*" H.R. Rep. No. 94-452, at 4-5 (emphasis added). It is also in line with the Executive's own treatment of the Beef Board as a government entity for tax and other purposes. *See* U.S. Pet. 17 n.4.

b. Yet even if this Court were to conclude otherwise, the generic advertising at issue would *still* constitute government speech. The government may—and frequently does—use "private entities to convey a governmental message."

Rosenberger, 515 U.S. at 833. When it does, the communication is still government speech and free from First Amendment scrutiny. *See Legal Servs. Corp.*, 531 U.S. at 541 ("viewpoint-based funding decisions can be sustained in instances * * * in which the government *use[s] private speakers to transmit specific information pertaining to its own program*") (quotation omitted; emphasis added).

In *Rust* v. *Sullivan*, for example, this Court upheld a viewpoint-based restriction on the speech of *private* doctors conducting counseling activities with federal funds because the government had employed the doctors to communicate its own message. 500 U.S. at 194.[4] In this case, it is even more obvious than in *Rust* that the speech at issue is the government's own. Although this Court has not yet articulated a particular test for determining whether speech is government speech, its recent decisions indicate that, where the government (1) prescribes the general content of a particular message; (2) for the purpose of advancing governmental objectives; and (3) retains ultimate editorial control over and responsibility for the message, the speech is properly characterized as government speech. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303 (student invocation at high school football game was government speech where invocation was "subject to particular regulations that confine the content and topic of the student's message"); *Legal Servs. Corp.*, 531 U.S. at 542 (program did not involve government speech where it did not "promote a governmental message"); *Southworth*, 529 U.S. at 229 (suggesting that, if public university

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[4] As the Court explained in *Legal Services Corp.*, "the Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors * * * amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding." 531 U.S. at 541. *See Rosenberger*, 515 U.S. at 833 (noting that in *Rust*, the government "used private speakers to transmit specific information pertaining to its own program").

uses its funds "to advance a particular message" and remains "responsible for its content," message is government speech).

Here, the general content of the speech at issue—that beef is "a valuable part of human diet" and that beef is a "desirab[le]" product—is prescribed by Congress. 7 U.S.C. §§ 2901(a)(1), 2902(13). The specific messages are formulated and communicated by special administrative bodies created by Congress and whose *raison d'être* is to carry out a congressionally-mandated program to further important governmental objectives. The Secretary of Agriculture retains final approval authority over and is ultimately responsible for the content of the specific messages. Thus, even if this Court were to conclude that the Board and Committee are private entities, it is clear that "when the Board or Committee 'speaks,' they do so on behalf of the Secretary of Agriculture." *Frame*, 885 F.2d at 1132. As a result, the speech they undertake pursuant to and under the strictures of the Beef Act and Beef Order is government speech.

3.a. The Eighth Circuit held in this case that the government speech doctrine is categorically inapplicable to cases, like this one, involving the compelled funding of speech. In its view, the government speech doctrine applies *only* in cases involving challenges to the government's "choice of content"; thus, government speech cases and compelled funding of speech cases "are fundamentally different," and never the twain shall meet. Pet. App. 17a. Because—in the Eighth Circuit's view—this case involves not the former but the latter category of cases, the court never actually decided whether the generic advertising conducted under the Beef Act is government speech.

The Eighth Circuit's conclusion—that government speech cases and compelled funding of speech cases "are fundamentally different"—finds no support in this Court's precedents. Indeed, if the Eighth Circuit were correct, *every* citizen—including smokers who object to the government's anti-

smoking ads, pacifists who object to the government's promotion of the armed services, and isolationists who object to the government's foreign policy—would have the constitutional right to insist that his or her tax dollars not be used to support programs or policies with which he or she disagreed. As explained, that is decidedly not the case. *See supra* at 22-23.

Moreover, this Court itself has specifically applied the government speech doctrine in the compelled funding context. In *Keller*, the Court considered whether an integrated state bar was a governmental entity and thus immune from a First Amendment challenge brought by some of the bar's members to the use of their dues to fund certain political and ideological activities to which they objected. *See* 496 U.S. at 12-13. Yet if government speech cases and compelled funding of speech cases "are fundamentally different," as the Eighth Circuit believed, the Court presumably would never have engaged in that inquiry.

Similarly, in *Southworth*, *supra*, this Court considered a challenge to a mandatory student activity fee imposed by a public university and used to support organizations engaging in political and ideological speech to which some students objected. There, the Court observed that "[i]f the challenged speech * * * were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." 529 U.S. at 229. But "[t]he University having disclaimed [the] speech [as] its own," the case did not "raise the issue of the government's right * * * to use its own funds to advance a particular message." *Id.* Again, if the Eighth Circuit were correct, the Court would have had no occasion to make those observations.

b. Unlike the Eighth Circuit, the District Court at least recognized that the government speech doctrine applies in this case. In holding that the generic advertising under the

Beef Act is not government speech, however, the District Court made several different errors. To begin with, the District Court drew unsupported conclusions from the record evidence as to the nature and extent of the Secretary's involvement in the checkoff program. The court recognized that "all projects are submitted to the Secretary for final approval to spend checkoff funds for the project," and that "USDA employees attend every meeting of the Board, the Operating Committee, and the [Board's] Executive Committee." Pet. App. 55a. Nevertheless, relying solely upon a single "admission" purportedly made by a USDA official, the court concluded that the Secretary's oversight of the checkoff program is merely "ministerial." *Id.*

That conclusion is wholly unfounded. The court did not point to any record support for the alleged "admission," and we can find none. In fact, at trial the USDA official in question flatly *rejected* the contention that the Secretary's role in the checkoff program is simply "ministerial." *See* J.A. 303-304. Moreover, the record contains substantial, unrebutted evidence that the Secretary—acting through the Agricultural Marketing Service of USDA—in fact exercises extensive oversight and control over all aspects of the checkoff program.

As the record reflects, USDA's involvement in the checkoff program is a "full-time operation." J.A. 303. *See also* J.A. 268. USDA staff are involved in the activities of the Beef Board "every day." J.A. 268-269. USDA actively participates in all developmental phases of projects and ads, from the germination of an idea to its eventual incarnation. J.A. 111, 138, 230, 273-274, 278-279, 303-304. USDA may even propose ideas to the Board and Committee. J.A. 301-302. USDA must give final approval to *all* projects and ads, and reviews all ads and other promotional materials prior to their release. J.A. 111, 113-114, 224-227, 273-275, 278-279, 295, 298. Projects and ads undergo two levels of review, and no project or ad will be approved unless all changes re-

quested by USDA are made. J.A. 113-114, 142. USDA has rejected ads in the past, J.A. 118, 261, 275, and has likewise encouraged the Committee to reconsider proposals it has rejected. J.A. 263-264.

USDA officials also actively participate in *all* Beef Board Advisory Committee meetings, where projects and budgets are first proposed; all Operating Committee meetings, where projects and budgets are reviewed and initially approved; all Beef Board Executive Committee meetings, where projects are again reviewed and approved; and all full Beef Board meetings, where budgets are approved and the program's direction and goals are established. J.A. 111-113, 138-141. USDA officials review materials in preparation for such meetings and provide input to Board and Committee members both prior to and at the meetings themselves. J.A. 112-113, 124-125, 270-271.

USDA must also approve all budget proposals, which also undergo two levels of review. J.A. 113-114. USDA reviews every proposed contract for checkoff-funded services before it is entered into by the Board or Operating Committee, randomly spot checks every subcontract involving checkoff-funded services, and rejects any proposed contract that fails to comply with the Beef Act or otherwise raises concerns. J.A. 115, 144, 227, 277-278. USDA also reviews all audits of major contractors, as well as all audits of the Beef Board itself. J.A. 282, 300-301. USDA provides orientation to new Board members, advises the Board in its hiring decisions, and maintains final approval authority over the selection of the Board's Chief Operating Officer, who works closely with USDA. J.A. 115-116, 123, 130-131, 144, 230, 276-277. USDA also approves in advance any testimony provided by Beef Board members or employees to Congress. J.A. 115, 144, 260.

The District Court's conclusion that the Secretary's oversight of the checkoff program is merely "ministerial" is

simply not supported by the record in this case. Indeed, reviewing *essentially the same record*, a different district court held that the generic advertising under the Beef Act *is* government speech, concluding that "[b]y no means is the government's control over the checkoff-funded program *pro forma*." *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002), *appeal pending*, No. 02-36140 (9th Cir.).[5]

Equally baffling is the District Court's conclusion—purportedly "based upon the evidence," but again without citation to the record—that the Secretary's "approval" of those nominated to the Board "is merely *pro forma*." Pet. App. 55a. The Beef Act provides that the Secretary herself "appoint" members to the Board, not that she "approve" appointments. *See* 7 U.S.C. § 2904(1). As the record shows, the Secretary receives at least two nominations, sometimes more, for each open seat on the Board. J.A. 116, 266-267. *See also* 7 C.F.R. § 1260.143(d). Nominations are submitted by organizations certified by the Secretary under specific criteria set out in the Act. J.A. 266-267. *See* 7 U.S.C. § 2905. USDA reviews the applications of and conducts background checks on each individual nominated, and forwards all relevant information to the Secretary so she can make a decision. J.A. 267. Decision-making requiring the Secretary to choose between two or more candidates in this manner can hardly be labeled "*pro forma*."

c. The District Court also concluded that "in evaluating whether the Beef Act's generic advertising scheme constitutes 'government speech,' one must take into account whether the speech comes from general tax revenues or instead from some forced assessments paid for by members of one group." Pet. App. 53a. The court apparently derived that idea from *Frame*, *see* Pet. App. 52a, where the Third Circuit also drew a distinction between speech funded by

[5] The parties in *Charter* stipulated to the submission of the case for decision on the summary judgment record in that case and the trial transcript in this case. *See* 230 F. Supp. 2d at 1123.

general tax revenues and speech funded by other assessments. In the Third Circuit's view, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group" there is a "coerced nexus" between the message and the individuals in the group. 885 F.2d at 1132. By contrast, the court reasoned, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated." *Id.*

That analysis is fundamentally flawed. The focus of the government speech inquiry is—and should be—on the entity that conveys the message at issue and on the process through which that message has been formulated. The focus is not—and should not be—on whether or to what extent the message might be ascribed to an individual (other than the speaker) as a result of the purported "nexus between the individual and the specific expressive activity." *Id.* at 1132. The latter inquiry lacks any grounding in this Court's First Amendment jurisprudence and provides a wholly unworkable rule of decision for distinguishing between government and non-government speech.

The Third Circuit derived its "nexus" analysis solely from a footnote in Justice Powell's concurrence in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 259 n.13 (1977), which states:

> Compelled support of a private association is fundamentally different from compelled support of government. * * * [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

See Frame, 885 F.2d at 1132-33. The pertinent distinction drawn by Justice Powell was not, as the Third Circuit apparently thought, the purported "nexus" between the individual and the message to which he objects. Instead, the distinction drawn was between being forced to associate with *private* speech—which is derived from "one segment of the population, with certain common interests"—and with *government* speech—which is derived from the government as "representative of the people." *Abood*, 431 U.S. at 259 n.13.

Thus, in determining whether the speech at issue in *Keller* constituted government speech, the Court focused on the entity that conveyed the message—the state bar—and *not*, as would have followed under the Third Circuit's analysis, the "nexus" between the bar's members and the message to which they objected. Because the Court concluded that the bar was not like a typical government agency or official who "[is] expected as a part of the democratic process to represent and to espouse the views of a majority of [its] constituents," the Court concluded that the messages it conveyed were not government speech. 496 U.S. at 12-13.

By contrast, here it follows under *Lebron* that the entities conveying the message to which plaintiffs object—the Beef Board and the Operating Committee—*are* government entities for First Amendment purposes. *See supra* at 24-26. Moreover, this case is distinguishable in a second, perhaps even more fundamental, respect. Here, unlike in *Keller*, the message being conveyed—that beef is "a valuable part of human diet," 7 U.S.C. § 2901(a)(1)—was formed in the first instance by *Congress* "as a part of the democratic process." 496 U.S. at 12. The Board and Committee were created by Congress with the express purpose of conveying that *particular* message to the public. They do so pursuant to precise governmental regulations and subject to the ongoing oversight and control of the Secretary of Agriculture.

No such governmental definition and control characterized the expressive activities of the state bar in *Keller*. The Court made clear that the messages at issue in that case represented the views of a particular group—the bar—on a wide and changing array of issues.[6] Here the message at issue was fixed by the representative of all the people—Congress—and is communicated under the direct supervision of the head of a federal agency who serves at the pleasure of the President. Although that message may be more beneficial to a particular group—which justifies Congress's decision to have that group fund its dissemination—there is no doubt that it is the *government's* message.

The fact that beef producers must pay to finance a government program designed to promote the commodity they sell is no different from pacifists paying to support the promotion of the armed services, or tobacco farmers paying to support government anti-smoking messages. In neither instance is the government attempting to compel adherence to its own message, as was the case in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable.

The Beef Act simply requires producers (including respondents) to pay a modest assessment on the sale of cattle—a

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[6] The bar was alleged to have been engaged in such far ranging—and openly political—activities as "endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing." 496 U.S. at 15. The Beef Act expressly prohibits spending for such political activities, *see* 7 U.S.C. § 2904(10), and expressly limits permissible speech activities to the promotion of beef. *See id.* §§ 2901(b), 2904(4)(B).

dollar per head of cattle that may have sold for upwards of $1,000 at market. The Beef Act neither "compel[s] [them] to utter what is not in [their] mind," *Barnette*, 319 U.S. at 634, nor makes them "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked respondents to express *their* support of beef promotion, as in *Barnette*, or to bear such a message on *their* property, as in *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant entity is worlds apart from compelling that entity to contribute financially to support government-supervised speech, especially when that speech directly furthers its own commercial interests. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate so long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.' ") (quoting *Wooley*, 430 U.S. at 717).

Justice Harlan made a similar point some time ago:

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. [*Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (concurring in the judgment).]

Society frequently calls upon its members to pay taxes, dues, or other assessments to support various organizations and entities both governmental and non-governmental. But no reasonable person would think that everyone who makes such a payment thereby endorses to the last jot and tittle the agenda of the recipient, because "the connection between the payment of an individual's dues and the views to which he

objects is factually so remote." *Id.* at 859. That is especially true here because, as this Court has held in another First Amendment context, a "reasonable observer" must be presumed to be aware of the "history and context" of a government program. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002) (rejecting argument that a state-funded school voucher program created a "public perception" that the State was endorsing religion) (quotation omitted).

Congress has broad authority to decide how to fund federal programs. *See Southworth*, 529 U.S. at 229 ("The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties.") (emphasis added).[7] Had Congress elected to fund

[7] As this Court has recognized across a spectrum of assessments, Congress has broad leeway to determine who should pay taxes or other exactions with respect to particular programs or commodities. *See, e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989) (statute requiring successful claimants before Iran-United States Claims Tribunal to pay assessments to cover Tribunal's operating costs); *Gurley* v. *Rhoden*, 421 U.S. 200 (1975) (state statute modeled on federal law imposing excise tax on producers of gasoline); *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 579-580 (1937) (discussing practice dating back to colonial times of imposing excise taxes "bound up with the enjoyment of particular commodities"); *Nicol* v. *Ames*, 173 U.S. 509, 526-527 (1899) (stamp tax on sale of cattle by those who availed themselves of privilege of using particular stockyards); *Head Money Cases*, 112 U.S. 580, 589-590 (1884) (statute imposing "duty" on shipowners of 50 cents per immigrant passenger to be used for an "immigrant fund" to pay for, among other things, care for recent immigrants). Indeed, as the Court has observed, it is not uncommon for commodity-specific assessments to be levied on those "who enjoy *no* direct benefit from its expenditure." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 & n.14 (1937) (emphasis added) (noting that some state taxes on the sale of cigarettes and tobacco are used "for school funds and educational purposes" and even "for pensions for Confederate soldiers"; taxes on the sale of liquor are used for "old age pension funds" and "school funds"; and that taxes on legalized horseracing are used for "fairs and agricultural purposes"). Here, of course, the assessments at issue are imposed on the class of individuals most likely to benefit from their expenditure. *See* 7 U.S.C. 2904(8)(C).

the generic advertising under the Beef Act with general tax revenues, there would be no question that the program's speech is government speech. The constitutional analysis should be no different simply because Congress decided, rather than using general tax revenues, to impose a modest assessment on those who, in Congress's judgment, "most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2), and who as a group have voted to fund the program. The generic advertising remains the government's message, with the content specified by Congress and articulated under the oversight and control of the Secretary.[8]

II. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS CONSTITUTIONAL UNDER THE *CENTRAL HUDSON* ANALYSIS.

Even if this Court were to conclude that the generic advertising under the Beef Act is not government speech, the Beef Act nonetheless survives First Amendment scrutiny under the traditional test for commercial speech articulated by this Court in *Central Hudson*. Under the *Central Hudson* test, a regulation of commercial speech is constitutional if it

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[8] In *Southworth*, the Court suggested that, in cases involving government speech, a court must consider "whether traditional political controls [exist] to ensure responsible government action." 529 U.S. at 229. In prescribing a program of promotional activity, the Beef Act expressly prohibits the use of assessments for the purpose of "influencing governmental action or policy." 7 U.S.C. § 2904(10). The Act and Order also require all plans and projects, as well as all budgets for promotional activities, to be approved by a politically accountable official, the Secretary. *Id.* § 2904(4)(C); 7 C.F.R. § 1260.169. Congress further provided that the program would continue only if approved by a majority of the cattle producers and importers voting in an initial referendum twenty-two months after the issuance of the Beef Order, 7 U.S.C. § 2906(a), and authorized additional referenda on whether to continue the program at any time thereafter if requested by a representative group comprising at least ten percent of cattle producers. *Id.* § 2906(b). Accordingly, whatever "traditional political controls" may be required "to ensure responsible government action," the Beef Act and Beef Order amply provide them.

(1) promotes a "substantial" government interest; (2) "directly advances [that] interest"; and (3) is "not more extensive than necessary to serve that interest." 447 U.S. at 566. The Beef Act readily meets each of those criteria here.[9]

First, it cannot be seriously disputed that the Beef Act promotes a substantial governmental interest: ensuring the welfare of the largest segment of the American agricultural economy. The Beef Act was enacted after a decades-long crisis in the beef industry and after previous congressional efforts had failed to alleviate the crisis. *See supra* at 8-10. Against that backdrop, Congress specifically enacted the Beef Act to "strengthen the beef industry's position in the marketplace" and thereby improve "the general economy of the Nation." 7 U.S.C. §§ 2901(a)(4), (b). Congress also expressly determined that the Act was "vital" and "in the public interest." *Id.* §§ 2901(a)(3), (b). Indeed, at a time of increased public concern over food safety in both domestic and foreign markets, the promotional and educational activities called for by the Beef Act are perhaps more "vital" than ever. *See supra* at 15-16.

Thus, as the Third Circuit put it in *Frame*, the Beef Act serves the substantial—indeed "compelling"—governmental interest of "preventing the collapse of a vital sector of the national economy," which would "endanger not only the country's meat supply but the entire economy." 885 F.3d at

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[9] The Eighth Circuit purported to "adapt" *Central Hudson* to this case. Pet. App. 22a. Instead of applying *Central Hudson*'s straightforward criteria, however, the court applied a bewildering amalgam of *Central Hudson* and other precedents that finds no support in this Court's First Amendment jurisprudence. *See* Pet. App. 22a-28a. Indeed, in the end, the Eighth Circuit concluded that *United Foods* was ultimately dispositive of the *Central Hudson* analysis. Pet. App. 26a-28a. In *United Foods*, however, this Court never suggested that the outcome of the *Central Hudson* test—which it specifically declined to apply because the argument had not been raised, *see* 533 U.S. at 410—would somehow be controlled by its analysis in *United Foods*.

1134 n.12. *See also id.* at 1134 (Beef Act passed to "prevent[] further decay of an already deteriorating beef industry").[10] At the same time, the Act also serves "important non-economic interests," such as "ensur[ing] preservation of the American cattlemen's traditional way of life." *Id.* at 1134-35. That "way of life" has long played an instrumental role in shaping—and defining—the American experience. *See supra* at 6-7.

Second, the Beef Act "directly advances" those substantial governmental interests. As this Court has frequently recognized, "there is an *immediate connection* between advertising and demand." *Central Hudson*, 447 U.S. at 569 (emphasis added). *See Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001) ("In previous cases, we have acknowledged the theory that product advertising stimulates demand for products."). Here, the "immediate connection" between the promotion conducted under the Beef Act and the demand for beef is well-documented. *See, e.g.*, Ronald W. Ward, *Evaluating the Beef Promotion Checkoff*, 4 National Inst. for Commodity Promotion Research & Evaluation Quarterly, No. 4, at 2 (1998) ("the beef checkoff has had a positive and statistically significant influence on the [number of] servings" of beef consumed in the United States) (emphasis omitted); Ronald W. Ward & Chuck Lambert, *Generic Promotion of Beef: Measuring the Impact of the US Beef Checkoff*, 44 J. of Agric. Econ. 456, 464 (1993) ("beef checkoff programmes have caused a measurable and signifi-

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[10] In *Frame*, the Third Circuit held that the Beef Act survives scrutiny under *Central Hudson* because it in fact survives scrutiny under an even *stricter* First Amendment standard. *See* 885 F.2d at 1134 n.12; *see also id.* at 1133-37 (Beef Act survives strict scrutiny under the standard articulated in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984)). In *Cochran* v. *Veneman*, 359 F.3d 263, 277 (3d Cir. 2004)—which did *not* involve the Beef Act—the Third Circuit concluded that *United Foods* had somehow "abrogated" *Frame*. 359 F.3d at 274. As noted, however, in *United Foods* the Court specifically declined to apply *Central Hudson* because the argument had not been raised. *See supra* at 40 n.9.

cant shift in the demand for beef," with "gains * * * registered at the producer level").

The record itself contains substantial evidence of this direct and immediate connection in the report of Ronald W. Ward, a professor of agricultural economics and a leading expert on the impact of the beef checkoff on the beef industry who regularly advises the Beef Board. J.A. 166-167, 169. In his report—as in numerous publications—Mr. Ward presents peer-reviewed statistical models that demonstrate that the generic advertising under the Beef Act has had "a measurable and statistically significant impact on the demand for beef." J.A. 170. On average, the promotion under the Beef Act yields a return of more than $5.65 for every dollar spent. *See* J.A. 172. Other evidence further demonstrates that the promotional activities conducted under the Beef Act—especially the "Beef. It's What's for Dinner." ad campaign—are effective. *See supra* at 14. Thus, by increasing demand for and sales of beef, the Beef Act "directly advances" the government's interest in "maint[aining] and "expand[ing] * * * existing markets for beef and beef products." 7 U.S.C. § 2901(a)(4).

Third, the Beef Act is no "more extensive than necessary to serve" those governmental interests. As this Court has emphasized, a regulation of commercial speech need not employ the "*least* restrictive means" to accomplish its objectives. *Lorillard*, 533 U.S. at 556 (emphasis added). Rather, all that is required is "a *reasonable* fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* (emphasis added; quotation omitted). As the Third Circuit concluded in *Frame*, the Beef Act "infringes on the contributors' rights no more than necessary to achieve the stated goal." 885 F.2d at 1137.

To begin with, the Beef Act merely requires producers to pay a modest assessment to support the *generic* promotion of beef—from which, in Congress's judgment, all producers of

that commodity benefit. *See* 7 U.S.C. § 7401(b)(2). It does not "compel any person to engage in any actual or symbolic speech" or "compel the producers to endorse or to finance any political or ideological views." *Wileman*, 521 U.S. at 469-470. Indeed, the Act expressly prohibits the use of funds for political activities. *See* 7 U.S.C. § 2904(10). Nor does the Act "impose[] [any] restraint on the freedom of any producer to communicate any message to any audience." *Wileman*, 521 U.S. at 469. To the contrary, producers are entirely free to communicate *any* message concerning beef—or anything else—that they desire.[11]

Moreover, the Beef Act contains numerous features designed to ensure that producers are satisfied with the benefits they receive under the checkoff program and that they have an opportunity to provide input concerning the content of the program. The program itself was established by a referendum requiring approval of a majority of producers voting in the referendum, and is subject to termination or suspension by referendum at any time if a majority of producers voting in a referendum so favor. 7 U.S.C. §§ 2906(a), (b). Producers, of course, sit on the Beef Board, and are appointed by the Secretary from nominations submitted by other producers. *Id.* § 2904(1). As Congress found, "[i]f the beef promotional program is to succeed, the program will need input and support from the beef industry." H.R. Rep. No. 99-271 (Part I), at 189.

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[11] Congress's decision to fund the program by targeted assessments on the sale of cattle as opposed to general tax revenues also ensures that the Beef Act is no more extensive than necessary to serve Congress's objectives. While certain taxpayers—*e.g.*, vegetarians or animal-rights activists—may have an objection to the promotion of beef, Congress could reasonably assume that the individuals most likely to support the promotion of beef were those who choose to make a living *selling* it. *See Wileman*, 521 U.S. at 470 ("since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program").

As the Third Circuit concluded in *Frame*, the mandatory assessments under the Beef Act "play[] an integral role in advancing both the economic and non-economic goals of the Act." 885 F.2d at 1135. As the court explained, a mandatory program is necessary to avoid "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost." *Id.* at 1135. This Court itself has recognized a "vital policy interest in * * * avoiding 'free riders' " where important governmental interests are implicated. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (collective bargaining). Here, the "free-rider" problem would pose an insurmountable obstacle to the success of a voluntary program, thus impeding the important governmental objectives that the Beef Act is intended to serve.

As Mr. Ward explains in his report, "given that the product has little differentiation," if the checkoff program were voluntary "some [producers] [would] choose not to participate even though they benefit equally." J.A. 168. Thus, because of "the equity concerns" with free riders, a voluntary program would likely fail. J.A. 169. In other words, producers are unlikely to contribute to a voluntary program if others will simply take a "free ride" on their contributions. Indeed, it is telling that the *mandatory* promotion and research program under the Beef Act was approved by an overwhelming majority of producers voting in a referendum, whereas referenda held to approve the *voluntary* promotion and research program under the predecessor Beef Information and Research Act *twice* failed to garner the support of the requisite majority of voting producers.

Finally, the payment of assessments into a collective advertising fund is also necessary to advance the government's substantial interests. As Mr. Ward explains, "the cost of a meaningful promotion program to an individual is likely so large that it is an impractical option except in those cases where the producer has a large share of the market."

J.A. 168.[12] Indeed, nearly eighty percent of all types of cattle producers in the United States own fewer than a hundred head of cattle; more than sixty percent own fewer than fifty. *See* U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Cattle* 12 (Jan. 31, 2003). Such producers are unlikely to be able to afford access to major media outlets, and thus—even if, in the aggregate, they match the Beef Board dollar for dollar—simply cannot reach the same audience that the Board can when it, say, runs its "Beef. It's What's for Dinner." ad on national television during the Super Bowl.[13]

Because an individual producer simply does not get the same "bang for his buck" when he spends it on his own advertising than when he contributes it to the Board, a "credit" system for individual advertising expenditures is simply not feasible.[14] Indeed, if every producer were to obtain a credit for his own advertising expenditures, the important governmental objectives of the Beef Act would not be achieved. As just explained, because of the "high entry cost[s]," most producers cannot conduct a "meaningful promotion program" that would reap the statistically proven benefits of the checkoff program. J.A. 168-169. Thus, even assuming that the total *amount* of advertising for beef would

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[12] Because of the free-rider problem, however, large producers are unlikely to make the significant expenditures necessary to mount a "meaningful promotion program." *See* J.A. 168-169.

[13] Checkoff funds are also used to promote U.S. beef in *foreign* markets. The typical individual domestic beef producer scarcely has the means or the incentive to market his particular product overseas. The Beef Act's mandatory assessment program thus plays a crucial role in ensuring that the United States maintains its share of the world's beef export market. *See supra* at 14-15.

[14] Although the Beef Act permits producers who have contributed to programs established by qualified State beef councils to obtain a credit of up to 50 cents for contributions to such programs, *see* 7 U.S.C. § 2904(8)(C), State beef councils have significant budgets and thus are more likely to conduct "meaningful promotion programs." *See* Brief for Texas, *et al.* as *Amicus Curiae* in Support of Petitioners at 8-9 (in support of certiorari).

be the same under a credit system, the *type* of advertising conducted by each individual producer would likely be too modest and too localized to appreciably "strengthen the beef industry's position in the marketplace" and thereby improve "the general economy of the Nation." 7 U.S.C. §§ 2901(a)(4), (b). If every producer (or a significant percent of producers) were to conduct his own advertising instead of contributing to the checkoff program's collective fund, the Beef Act could not accomplish those objectives, either.

The events of the past year have underscored the importance of a collective fund for beef promotion and education. The discovery of a BSE-infected cow in the United States in December 2003 created a new crisis for the U.S. beef industry. The ability—made possible only by the Beef Act—to respond swiftly and *nationally* to that crisis has been critical in ensuring the welfare of the industry during this volatile period. *See supra* at 15-16.[15]

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[15] The virtues of institutions promoting agricultural commodities on a national scale have long been extolled. In his Eighth Annual Address to Congress, President George Washington not only touted the "primary importance" of agriculture to the "national welfare," but the importance of "[i]nstitutions for promoting it * * * supported by the public purse." 1 *Messages and Papers of the Presidents* 202 (James D. Richardson ed. 1903). As Washington noted, "[a]mong the means which have been employed to this end none have been attended with greater success than the establishment of boards * * * charged with collecting and diffusing information, and enabled by premiums and small pecuniary aids to encourage and assist a spirit of discovery and improvement." *Id.* Washington further emphasized that these boards "are very cheap instruments of immense national benefits," because they are able to stimulate "enterprise" in this area by collecting and "spreading [agricultural information] thence over the whole nation." *Id.* More than two centuries after Washington delivered those remarks, the Beef Board—"enabled by premiums and small pecuniary aids"—serves as a similar "instrument[] of "immense national benefits," not only by promoting beef nationally, but, in response to events such as the BSE case, by swiftly disseminating information about the safety of beef to consumers "over the whole nation."

III. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *WILEMAN*.

In *Wileman*, this Court upheld a similar generic advertising program for California tree fruit because the program (conducted pursuant to marketing orders issued by the Secretary) was viewed as "a species of economic regulation," and therefore not subject to First Amendment scrutiny. *Wileman*, 521 U.S. at 477. *See also United Foods*, 533 U.S. at 415 (assessments in *Wileman* "were nothing more than additional economic regulation, which did not raise First Amendment concerns"). In *United Foods*, the Court distinguished *Wileman* on the ground that the generic advertising in *United Foods* was "not part of some broader regulatory scheme." *Id.* As the Court noted, " 'the mushroom growing business is * * * unregulated, except for the enforcement of a regional mushroom advertising program.' " *Id.* at 413 (quoting court of appeals). *See id.* at 412 (no laws "regulate how mushrooms may be produced and sold"). Indeed, "[t]he only program the Government contend[ed] the compelled contributions serve[d] [was] the very advertising scheme in question." *Id.* at 415.

This case is closer to *Wileman* than *United Foods* because the beef promotion conducted under the Beef Act is part of a "broader regulatory scheme" governing the beef industry. *Id.* at 415. Like the marketing orders in *Wileman*, numerous statutes regulating the manner in which beef is marketed and sold help "establish and maintain orderly marketing conditions and fair prices for agricultural commodities." 521 U.S. at 461 (citing 7 U.S.C. § 602(1)).

The Packers and Stockyards Act, 7 U.S.C. §§ 181 *et seq.*, for example, gives the Secretary of Agriculture the authority to "prescribe the rate, charge, regulation, or practice" of stockyard owners, market agencies, and dealers in connection

with the buying, selling, or marketing of livestock. *See* 7 U.S.C. § 212. The Act further requires that all rates and charges for stockyard services be posted and be "just, reasonable, and nondiscriminatory." *Id.* §§ 206-207. The Livestock Mandatory Reporting Act, 7 U.S.C. §§ 1635 *et seq.*, requires packer processing plants to report detailed price information to the Secretary at least twice daily and requires the Secretary to make such information available to the public at least three times daily. *See id.* § 1635e. These reporting requirements are specifically intended to help producers "negotiate the best possible price for their livestock." S. Rep. No. 106-168, at 2 (1999).

The Federal Meat Inspection Act ("FIMA"), 21 U.S.C. §§ 601 *et seq.*, establishes a meat inspection and labeling system. Pursuant to the Agricultural Marketing Act of 1946 ("AMA"), 7 U.S.C. §§ 1621 *et seq.*, the Secretary has established a voluntary beef grading program. *See id.* § 1622(h); J.A. 282; *see also Wileman*, 521 U.S. at 462 (marketing orders "govern[ed] marketing matters such as fruit size and maturity levels"). Both of these programs are intended to ensure orderly market conditions and favorable prices for producers. The FIMA, for instance, recognizes that "[u]nwholesome, adulterated, or misbranded meat * * * destroy[s] markets for wholesome * * * meat * * * and result[s] in sundry losses to livestock producers." 21 U.S.C. § 602. Likewise, the AMA expressly declares as among its objectives to ensure that agricultural products "may be marketed in an orderly manner" and that "the full production of American farms * * * be disposed of usefully, economically, profitably, and in an orderly manner." 7 U.S.C. § 1621. *See also id.* § 1622(h) (directing establishment of grading programs "to the end that agricultural products may be marketed to the best advantage").

This extensive regulation of the beef industry—not as pervasive, to be sure, as the marketing orders in *Wileman*—nonetheless stands in stark contrast to the "unregulated"

mushroom market considered in *United Foods*. 533 U.S. at 413.[16] The Beef Act—enacted to "strengthen the beef industry's position in the marketplace," 7 U.S.C. § 2901(b)—is properly viewed as "ancillary" to this "broader regulatory scheme." *United Foods*, 533 U.S. at 411. Moreover, the required degree of additional regulation under *Wileman* to justify a program of producer-supported promotion should not be considered in isolation from the nature of the promotion. Regulation of a degree such as that characterizing the beef industry should suffice to bring compelled funding of speech within *Wileman* when the speech is strictly limited to generic promotion as under the Beef Act.

Indeed, as Justice Breyer explained in his dissent in *United Foods*, the generic nature of the advertising at issue should be enough to bring this case entirely within the ambit of *Wileman*. There, as Justice Breyer observed, the Court "gave the following reasons in support of [its] conclusion" that the generic advertising at issue "did not 'rais[e] a First Amendment issue,' " but rather "was 'simply a question of economic policy for Congress and the Executive to resolve' ":

> "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views." [533 U.S. at 419 (quoting *Wileman*, 521 U.S. at 468-470) (alteration in original).]

As Justice Breyer explained, the promotional program in *United Foods*, "although it involve[d] mushrooms rather than

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[16] In *United Foods*, moreover, the Court noted that "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412. Here, by contrast, a significant portion of each checkoff dollar is used for something *other* than promotion, such as research and education. *See* Beef Report at 3 (16.01% of Beef Board's 2003 budget used for education and 10.55% used for research).

fruit, [was] identical in each of these three critical respects." *Id.* at 420. Accordingly, "these similar characteristics demand[ed] a similar conclusion." *Id.*

The same is true here. "Respondents are not required themselves to speak, but are merely required to make contributions for advertising." *Wileman*, 521 U.S. at 471. At the same time, the program does not "abridg[e] * * * anybody's right to speak freely." *Id.* at 474. Nor are assessments "used to fund ideological activities." *Id.* at 473. As a result, "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience." *Id.* at 472. In sum, like the assessments at issue in *Wileman*, the assessments under the Beef Act are "a species of economic regulation," *id.* at 477, that simply "[do] not raise First Amendment concerns." *United Foods*, 533 U.S. at 415.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

GREGORY G. GARRE
LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

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Ann M. Veneman, et al.,
Petitioners,
v.
Livestock Marketing Association, et al.

Nebraska Cattlemen Inc., et al.,
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On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE RESPONDENTS

Philip Olsson
OLSSON, FRANK & WEEDA, P.C.
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 516-6366

Laurence H. Tribe
(Counsel of Record)
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138

Ronald A. Parsons, Jr.
Scott N. Heidepriem
JOHNSON, HEIDEPRIEM,
MINER, MARLOW &
JANKLOW, L.L.P.
P.O. Box 1107
Sioux Falls, SD 57101

Thomas Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, NW
Washington, DC 20016

October 15, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF FOR THE RESPONDENTS

JURISDICTION

The petitioners correctly state this Court's jurisdiction over this case.

STATEMENT OF THE CASE

I. Background

1. The United States beef production industry is comprised of almost one million individual farmers and ranchers who sell cattle at prices determined by the laws of supply and demand. Pet. App. 54a. Characterized by free competition among proudly independent producers, the industry is the antithesis of a collectivized market.[1] Yet pursuant to the Beef Promotion and Research Act, 7 U.S.C. 2901 *et seq.* (Beef Act), producers must finance an industry-run generic beef promotion program that the government paternalistically deems to be in their collective interest. This suit arises because respondents, South Dakota and Montana ranchers and organizations representing their interests,[2] object to this

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[1] Although the beef industry is subject to some regulation, most of it does not govern the *production* phase, and none of it undercuts the competitive nature of the industry—rather, most beef regulation is affirmatively *pro-competitive.* The Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*, the primary federal statute regulating the beef industry, aims principally to prevent collusion, price manipulation, and other anticompetitive practices on the part of packers, livestock dealers, and stockyards. See *id.* § 192. See also, *e.g.*, *id.* § 1635 (requirement that buyers report prices is intended to "encourage[] competition"); 21 U.S.C. 602 (inspections at processing and slaughter stage preserve fair competition by preventing faulty products from being marketed at below-competitive prices). The government's beef grading system is wholly voluntary. See 7 U.S.C. 1621 *et seq.*

[2] Respondent Livestock Marketing Association (LMA) is an association of livestock markets—that is, auction yards and other

"checkoff" requirement, which compels them to finance speech with which they disagree and to associate for expressive purposes with industry organizations they have refused to join.

The promotions issued pursuant to the Beef Act are generic in character—meaning that, among other things, they do not distinguish between the grain-fed U.S. beef produced by respondents and the grass-fed beef produced abroad, which respondents regard as inferior. Respondents object to this simplistic "beef is good" message, which obscures the quality differences between U.S. and foreign beef. Beyond the economic perversity of being forced to promote their foreign competition, respondents object to the fact that the promotions are expressly attributed to them through messages, which appear in each television and print advertisement, identifying the ads as "funded by America's Beef Producers."[3] And because respondents, like many cattle producers, place a premium on their independence from the government and its controls and exactions, they are *especially* offended to the degree that these messages are deemed "governmental" in character. J.A. 196.

Respondents also object to being forced to associate for expressive purposes with the various organizations, ranging from wholly private to quasi-governmental in nature, involved in collecting and spending their checkoff dollars, including the National Cattlemen's Beef Association (NCBA), the Cattlemen's Beef Board, and beef councils in various states. See *infra* at 4-5. Those associations advance messages—including, but not limited to, the generic promotions

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entities that facilitate sales, collect "beef checkoff" assessments, and remit them to the seller's state beef association. Respondent Western Organization of Resource Councils (WORC) is an association of grassroots organizations that seek to protect family farms.

[3] J.A. 50-52 (also bearing the copyright of the "National Cattlemen's Beef Association and Cattlemen's Beef Board"). The government is not mentioned.

themselves—that respondents believe are harmful to small, independent cattle producers. J.A. 197, 201, 204, 215-16, 218-19. NCBA, in particular, takes partisan political positions—endorsing President Bush's reelection, for example.[4] No discernable attribution difference, other than a check-mark graphic that is meaningless to the public, distinguishes the checkoff-funded promotions from NCBA's political messages, which are purportedly not funded by the checkoff—although dollars are notoriously fungible, see J.A. 205.

2. The Beef Act is "not imposed as part of a statute or marketing order that comprehensively regulates the commodity," Pet. for Cert., *United States* v. *United Foods*, No. 00-276 (Aug. 2000), at 13. Instead, the sum and substance of the Beef Act is speech itself. See Pet. App. 11a. Indeed, of more than one billion dollars in checkoff funds spent since the Beef Act's enactment, approximately eighty-five to ninety percent have been spent on generic promotions,[5] and only ten to twelve percent on research, Pet. App. 47a; J.A. 265, and the latter figure encompasses *marketing* research, see 7 U.S.C. 2902(15).

3. The beef promotion program is primarily controlled by representatives of private industry. The Beef Act requires producers to pay one dollar per head of cattle sold to state "beef councils," which may be either private or quasi-governmental in character. 7 U.S.C. 2904(8)(C); *id.* § 2904(1).[6] The councils in turn must remit fifty cents of each

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[4] See *NCBA Policy Division Says Bush Is The One*, available at http://www.beef.org/dsp/dsp_content.cfm?locationId =45&contentTypeId=2&contentId=2746 (Aug. 18, 2004); see also *Amicus* Br. of Campaign for Family Farms 11-12.

[5] "Promotion" encompasses "any action, including paid advertising, to advance the image and desirability of beef and beef products" to promote sales. 7 U.S.C. 2902(13).

[6] Importers of beef pay an assessment equivalent to this in value. 7 U.S.C. 2904(8)(C). The Beef Act extended an earlier statute that had authorized a voluntary beef promotion program. See

dollar to the Cattlemen's Beef Board,[7] an organization made up of 111 individual domestic cattle producers and importers of foreign beef, which directs the promotion program. *Id.* § 2904(1). The councils typically send up to half of the fifty-cent balance directly to NCBA, a wholly private trade association that also enjoys a virtual monopoly on the Beef Board's contracts for implementation of the activities authorized by the Act. J.A. 207-08, 236. The Beef Act does not permit the United States Government to fund any of the activities the Act authorizes. 7 U.S.C. 2911. Accordingly, the program is not subject to annual congressional review pursuant to the normal appropriations process.

Beef Board members, who are beef industry volunteers nominated by private industry organizations from various states and approved in slate fashion by the Secretary of Agriculture, 7 U.S.C. 2904(1); J.A. 108-09, are not government officials or employees. The Board's messages are selected and developed by a twenty-member Beef Promotion Operating Committee, 7 U.S.C. 2904(4)(B), (C); J.A. 96-98, 189-90, 236-39. Ten members are independently elected by the beef industry through the NCBA, and the Secretary has no discretion over their appointment; she must simply certify that they are directors of a state's beef council as the Act requires. 7 U.S.C. 2904(4)(A); J.A. 302-03. The other ten members come from the Beef Board and are thus functionally picked by the industry as well. 7 U.S.C. 2904(4)(A).

Pursuant to the Act, the Department of Agriculture (USDA) ratifies producer-selected expenditures of checkoff funds. 7 U.S.C. 2904(6)(B). USDA has no power to compose or select the messages on which checkoff dollars are

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Beef Research and Information Act, Pub. L. No. 94-294, 90 Stat. 529 (May 28, 1976). This earlier program's initiation was subject to a referendum that twice failed, as petitioners explain, see Nebraska Cattlemen Br. 9-10, and therefore never went into effect.

[7] 7 U.S.C. 2904(8)(C). The Board collects the assessment directly in the five states with no state beef council. *Id.* § 2904(8)(B).

spent. Instead, private beef industry contractors submit promotion proposals to the Operating Committee, which then selects among them. *Id.* §§ 2904(6)(a), 2904(4)(B). The Secretary's role is simply to provide or withhold her "approval," upon which the projects selected by the Committee "become effective." *Id.* § 2904(6)(B). In practice, such approval is *pro forma*, provided the project does not fall outside the broad parameters of the Act; reflecting this *pro forma* role, implementation of projects sometimes begins even before such approval. J.A. 106, 299. The Annual Beef Industry Planning Cycle jointly developed by the Beef Board and NCBA accordingly provides no role for USDA. J.A. 107.

The Beef Board's own materials highlight this lack of governmental control, explaining that "[a] checkoff is directed by its funders and managed by a professional staff. Funders are responsible for allocating funds and approving business plans and programs." J.A. 101. "No decision of the Beef Board is implemented without first being approved by cattle producers." J.A. 248; see *id.* at 81-94, 136.[8]

II. Procedural History

The Beef Act contains a provision for the program's termination by a majority of cattle producers voting in a referendum; the Secretary must schedule such a referendum if more than ten percent of producers subject to the checkoff sign a petition requesting one. 7 U.S.C. 2906. Frustrations with the Act reached a boiling point in 1998, as producers found them-

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[8] The Beef Act itself has not helped domestic cattle producers. Since its enactment, consumption of domestic beef has dropped significantly and domestic cattle prices have fallen, while foreign beef imports have nearly doubled. J.A. 55-56, 194-95, 202, 213-14, 221-23, 289-91. The share of consumer dollars spent on beef that accrues to cattle producers has also fallen almost by half. J.A. 213-14, 223. The main beneficiaries of the Beef Act (in addition to importers) have thus been packers, processors, retailers, and foreign producers—none of whom contribute to the checkoff. J.A. 60, 63.

selves paying the checkoff on cattle sold at prices that failed to cover even the costs of production. J.A. 56. With the assistance of respondent LMA, these producers collected more than 145,000 petition signatures (more than ten percent of producers) supporting a referendum, notwithstanding that the Beef Board had used checkoff funds to pay for "producer communications"—*viz.*, political messages opposing the referendum. For fourteen months after receiving these petitions, the Secretary failed to schedule a referendum. Pet. App. 33a.

On December 29, 2000, respondents brought this action as a challenge both to the Secretary's inaction and to the aggressive "producer communications" campaign. On February 23, 2001, following a hearing, the district court granted a preliminary injunction against these producer communications, holding that the Act and its implementing regulations do not authorize this use of checkoff funds, that some of the communications ran afoul of the Act's prohibition on lobbying, and that the use of objectors' funds for this purpose violated their First Amendment rights. See *Livestock Marketing Ass'n* v. *USDA*, 132 F. Supp. 2d 817, 829-32 (D.S.D. 2001) (*LMA I*) (citing 7 U.S.C. 2904(4)(B); *id.* § 2904(10); 7 C.F.R. 1260.167). The parties initiated discovery in preparation for trial on the remaining referendum issues. After this Court's decision in *United States* v. *United Foods*, 533 U.S. 405 (2001), striking down the materially identical mushroom promotion program, respondents amended their complaint to include broader First Amendment claims. Trial of those claims took place on January 14-15, 2002, and on June 21, the district court rejected petitioners' claim that the beef checkoff constituted "government speech" and held the Beef Act unconstitutional pursuant to *United Foods*, Pet. App. 56a-60a.

The Eighth Circuit affirmed. First, the court of appeals independently reviewed the record and upheld the district court's findings on all crucial facts. Pet. App. 11a. It agreed that the Beef Act is indistinguishable from the mushroom program at issue in *United Foods*, and that its principal object is speech itself. *Ibid.* The court then rejected petitioners'

government speech argument on the ground that respondents were not challenging the government's control of the content of its own speech, but instead "assert[ed] their free speech and free association rights to protect themselves from being compelled to pay for that speech, with which they disagree." *Id.* 17a-19a. The court both refused to label the Beef Act promotions "government speech" and held in the alternative that "a determination that the expression at issue is government speech does not preclude First Amendment scrutiny in the compelled speech context." *Id.* 23a n.9 (citing *Wooley* v. *Maynard*, 430 U.S. 705, 715-17 (1977)).

SUMMARY OF THE ARGUMENT

In *United States* v. *United Foods*, 533 U.S. 405 (2001), this Court invalidated on First Amendment grounds a generic mushroom promotion program in all relevant respects identical to the program at issue here. That holding controls this case. The assessments mandated by the Beef Act cannot survive the demanding First Amendment scrutiny that this Court has applied to laws compelling private persons to finance speech. The beef promotions are not germane to—that is, are not essential to the functioning of—any vital non-speech function of the Beef Act program. As with the mushroom program, speech itself is the Beef Act's primary purpose.

Petitioners do not, in fact, make a serious effort to distinguish *United Foods* based on differences between the mushroom and beef programs. Instead, they ask this Court in effect to *overrule* that case—by holding either (a) that its entire First Amendment analysis was simply irrelevant, because commodity promotion programs are immune from First Amendment scrutiny as "government speech"; or (b) that the Court applied the wrong constitutional standard in *United Foods*, and should instead have applied intermediate scrutiny pursuant to *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), which, petitioners contend, would have led to the opposite conclusion.

Petitioners' government speech argument boils down to one central proposition: that, if the government controls the content of speech, then everything related to that speech, including a requirement that an identifiable group of private persons fund it and associate themselves with it, is immune from First Amendment scrutiny. Even setting aside petitioners' dubious *factual* premise that the government's control over Beef Act speech is more than merely *pro forma*—a premise that would require this Court to overturn the factual findings of both lower courts—their central *legal* premise is untenable. Most glaringly, the rule petitioners propose cannot distinguish circumstances in which the government *speaks* from circumstances in which the government so comprehensively *censors, directs, or compels private speech* that any "control" test is easily met. Ordinarily, increased government control of speech triggers *more* demanding First Amendment scrutiny, not less. Thus, although government control may be necessary for the application of a "government speech" defense, it is surely not sufficient.

At its core, petitioners' argument misapprehends the nature and purpose of the "government speech" label. The government must speak on its own behalf in order to function. Respondents do not challenge the government's ability to speak as it chooses; rather, they challenge its ability to compel beef producers, on pain of sacrificing their chosen livelihood, to fund and otherwise associate themselves with speech the content of which they do not in fact endorse, and some of which they find altogether unacceptable. Permissible government control over the content of speech does not permit the use of coercion to force private persons to support its composition and dissemination. Indeed, in a long line of cases, including *Wooley* v. *Maynard*, 430 U.S. 705 (1971), and *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), this Court has made clear that the government may not conscript private citizens to disseminate a message that the government itself creates and properly controls.

This Court has also repeatedly recognized that the First Amendment's ban on such conscription forbids the government from requiring private persons to *finance* speech—in cases involving, for example, union agency fees (*Abood* v. *State Board of Education*, 431 U.S. 209 (1977), *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991)), state bar association dues (*Keller* v. *State Bar of California*, 496 U.S. 1 (1990)), student activities fees (*Board of Regents* v. *Southworth*, 529 U.S. 217 (2000)), and commodity promotion checkoffs (*United Foods*). Moreover, this Court's expressive association cases (*e.g.*, *Abood*, *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000)) make clear that no one may be compelled to associate with an expressive organization—whether by joining it or by funding its expressive activities.

As *Keller*, especially, makes plain, the right to be free of such coerced financial support and expressive association is no less present, and no less significant, when the government shapes the message. Indeed, it may be *more* significant, for perhaps the First Amendment's *core purpose* is to protect the right of private individuals and groups to dissociate themselves from the government, its views, and its messages. Compulsion to support a government message is the very essence of what the First Amendment forbids. And it is no answer for the government to say that each person within a particular occupational, demographic, or otherwise identifiable group can simply be *assumed* to support a particular message just because the government, guided by conventional wisdom or by a dominant ideology, deems that message to redound to the group's collective benefit. It is not for the government to define each citizen's view of what advances her welfare.

When it has considered a "government speech" defense, this Court has accordingly emphasized two factors quite separate from the degree of government authorship, or control over the content, of speech: the public's likely *attribution* of the speech, and the mechanism by which the speech is *funded*. Consideration of those two factors leads inexorably to the conclusion that the Beef Act is unconstitutional.

This Court could reach that conclusion along either of two paths. First, the Court could follow the approach it employed in *Keller*, in which the Court treated the fact that an organization was associated with and funded by a discrete, occupationally defined group as negating any characterization of the organization's speech as "governmental" even though the state created the organization and closely superintended it. Alternatively, the Court could avoid this labeling exercise and simply hold that, even if the speech is that of the "government," such a characterization bars constitutional challenges only to the government's control of the content of that speech; the government does not thereby acquire authority, free of the usual First Amendment constraints, to compel beef producers to fund and thereby associate themselves with speech to which they object. Under either approach, the Beef Act falls for the same reasons: the generic beef promotions are likely to be attributed by the public to the beef producers rather than to the government; and the checkoff requirement violates objectors' First Amendment rights to be free from compelled funding of speech and compelled expressive association.

These two related constitutional shortcomings are of special significance for a critical reason underlying this Court's approach in cases addressing government speech: that the most appropriate safeguard against government's abuse of its power to speak for itself is political. In a democracy, if it is sufficiently apparent that the government is speaking on its own behalf, we, the people, will be on guard against government's abuse of its power over the bully pulpit and against allocation of taxpayer dollars to fund speech the people do not wish to support. The requirements of transparency and fiscal accountability thus limit the ability of the government wolf to appear in sheep's clothing, propagating its own views in the guise of the views of private persons. They also limit government's ability to deploy the tools of propaganda beyond taxpayers' willingness to foot the bill.

These political safeguards are obliterated if the government's messages are presented as those of private entities, and

are deeply undermined if the costs of the government's loudspeaker are taken "off budget" by funding decisions that shift those costs to a subset of the population. Moreover, coerced funding puts members of that subset, if defined by their occupation, to a choice that is anathema to the First Amendment's freedoms of speech and expressive association: either forgo their livelihoods, or submit to forced linkage with the rest of the group in paying for, and being publicly labeled as the sponsors of, the expression of a message to which they object.

None of these consequences follows if the taxpaying public as a whole funds the speech at issue through general public revenues. For, as this Court has repeatedly recognized everywhere but in the Establishment Clause context, the link between taxpayers and the programs their money might support (including programs involving expression) is far too diffuse to create a constitutionally cognizable compelled association. Taxpayers are not, by virtue of their tax payments, involuntarily associated with any particular governmental message — even if some portion of an otherwise general form of tax is "earmarked" for the support of such a message.

Indeed, even some narrowly targeted special assessments might, when used to fund government speech, escape (or at least withstand) constitutional scrutiny. Fees for the privilege of attending universities or using various government facilities or programs, for instance, are not *compelled*, but are simply the price of voluntary use of a public service, nor do they in any event associate the payer with any message expressed by the payee. Likewise, taxes assessed on each sale of a particular product, used to fund government health and safety campaigns advertising the product's dangers or criticizing its producers, are not jeopardized by the analysis proposed here—in part because the public would never attribute the government's warnings to those who pay the taxes, whether producers or users. Petitioners' overheated arguments about the numerous government programs respondents' position would endanger are, in short, nothing but straw men.

Finally, as an alternative to its "government speech" defense, the government contends that the beef promotion program survives First Amendment review under the standard set by *Central Hudson*. This Court squarely rejected that contention in *United Foods*, holding that, even if it accepted the dubious premise that *Central Hudson* sets forth the applicable standard, the mushroom promotion program could not come close to satisfying it. The purported government interests asserted by petitioners here, such as the supposed "free rider" problem, are merely *ex post* rationalizations; there is no evidence that they actually motivated Congress, and they have no basis in fact. Furthermore, the Beef Act's funding mechanism is not narrowly tailored; obvious, less burdensome alternatives include financing the program through general tax revenue or voluntary contributions.

More fundamentally, petitioners' attempt to invoke *Central Hudson* seeks to fit a square peg into a round hole. *Central Hudson*'s rationale has no logical application in compelled speech cases, which involve none of the unique features of the buyer-seller relationship that might justify subjecting *regulation* of commercial speech to less than strict scrutiny. In such cases, *Abood* sets the governing standard.

ARGUMENT

I. The Beef Act Violates Respondents' First Amendment Rights Of Speech And Association, And The Very Facts That Establish The Constitutional Infirmity Preclude This Court From Sustaining The Act On "Government Speech" Grounds.

As this Court's decision in *United States* v. *United Foods* makes clear, the generic beef promotion program authorized by the Beef Act abridges respondents' First Amendment rights against compelled speech and compelled expressive association. Two features of the Beef Act are fatal: first, the promotions are expressly attributed to producers, ensuring that they will be involuntarily associated by the public with

messages to which they object; and second, the checkoff requirement conscripts producers to support these messages as the price of pursuing their livelihood. These very same features of the Act *also* demonstrate the futility of petitioners' principal attempt to evade this Court's clear holding in *United Foods*—namely, their "government speech" argument.

That argument consists of two related propositions: that speech under the Beef Act is properly characterized as "governmental" simply because the government allegedly controls its content; and that such characterization of speech as "governmental" suffices to remove everything related to that speech (*e.g.*, its funding and attribution, as well as its content) from First Amendment scrutiny. Taken together, these two propositions constitute an assertion of government power over private speech that is breathtaking in scope. It amounts to the claim that, so long as the government asserts *enough* control over speech, *no* First Amendment scrutiny whatsoever applies. None of this Court's decisions related to government speech—indeed, no decision of *any* kind of *any* court of which respondents are aware—supports this topsy-turvy view of the First Amendment.

In rejecting petitioners' view, this Court could validly take either of two approaches. First, it could decline to label the Beef Act promotions as "government speech"—recognizing that, even accepting *arguendo* that the government controls their content (an assertion the lower courts properly rejected), this control is insufficient to merit characterizing the speech as governmental. An advantage of this approach is that this Court followed it in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990)—the closest precedent by far, and one that petitioners all but ignore. In *Keller*, the Court acknowledged that the speaking entity was clearly "governmental" under state law, but refused to label the entity's speech "government" because it represented not the general public but an identifiable group of individuals who were compelled by virtue of their occupation to make payments to it. *Id.* at 10-11.

Alternatively, the Court could eschew these semantic distinctions and simply recognize the core principle that underlies *Keller* as well as many of its other compelled speech and compelled association rulings: that the government may not compel selected groups of private individuals to fund and to associate themselves with speech *even if that speech is the government's own*, unless the constitutional tests to which this Court has previously subjected such compulsion are satisfied. On this view, the classification of speech as "governmental" or "private" is not dispositive. Although the government's control over the *content* of its own speech is not limited by the First Amendment, its character as "government speech" does not similarly insulate from review *other aspects* of an expressive program, such as how it is funded and how the messages are attributed. The principal advantage of this approach is its logical clarity; by using it, this Court could sweep away some of the confusion that has surrounded the still-nascent idea of a "government speech doctrine."

Either approach, however, equally demonstrates that no "government speech defense" can shield the Beef Act from First Amendment scrutiny. And, once that scrutiny is applied, the Act is unconstitutional, as *United Foods* makes plain.

A. This Case Is Indistinguishable From *United Foods*, Demonstrating That The Beef Act Falls Under This Court's Compelled Speech And Compelled Association Precedents.

In *United States* v. *United Foods*, 533 U.S. 405 (2001), this Court held that the generic mushroom promotion program, a checkoff program that is in all relevant respects identical to the Beef Act program, failed the First Amendment test that this Court has long applied to government programs that compel private persons to finance speech with which they disagree. See, *e.g.*, *Abood* v. *State Board of Education*, 431 U.S. 209 (1976). The government makes no serious attempt to argue that the beef program satisfies the *Abood* test, nor, indeed, to distinguish *United Foods* in terms of differences

between the programs at issue.[9] Some of its *amici* do, but their arguments misunderstand the *Abood* test.

Abood was one of a line of cases addressing "agency shop" arrangements that require employees in a unionized workplace, even if they refuse to join the union, to submit fees reimbursing the union for its activities on their behalf as collective bargaining representative. This Court has held that to the extent such fees are used to finance *expressive* activities, they burden objecting employees' First Amendment rights by forcing them to affiliate themselves with an expressive association and fund speech with which they disagree. Unions' use of agency fees to fund expression thus must, as this Court held in *Lehnert* v. *Ferris Faculty Association*:

> (1) be "germane" to collective-bargaining activity;
>
> (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and
>
> (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991) (clarifying the *Abood* test).

United Foods made clear that this analysis applies to commodity promotion programs. 533 U.S. at 514-15. This Court did not need to reach the second and third portions of the test in *United Foods*, but instead held simply that the mushroom promotion program did not even satisfy the "germaneness" requirement. That requirement is far more rigorous than petitioners' *amici* acknowledge: to qualify as "germane," it is insufficient for speech to be *relevant* to a valid non-speech program—nor does it suffice for the speech sim-

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[9] Nebraska Cattlemen all but argue that *Abood* and its progeny should be overruled, asserting that compulsion to fund speech is not compelled speech. Nebraska Cattlemen Br. 37 (quoting *Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (Harlan, J., concurring in the judgment)); *id.* at 37-39. This argument conflicts with decades of this Court's case law and merits no serious consideration.

ply to serve that program's overall purpose. See, *e.g.*, *Amicus* Br. of American Cotton Shippers Ass'n 3 (arguing that promotions help the Cotton Board to "communicate and capitalize on" research breakthroughs). Rather, the speech must be *necessary to the functioning* of the non-speech program; it must be an inextricable part of the performance of its non-speech function. Hence, the *Lehnert* Court held that non-members could not be compelled to fund union lobbying efforts intended to increase funding of the teaching profession generally, as that speech was *not* "germane" to the collective bargaining function of a teachers' union: *e.g.*, speaking to management at the bargaining table, or lobbying the legislature to approve a bargaining agreement. 500 U.S. at 527.

The difference in outcome between *United Foods* and *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457 (1997), further illustrates this distinction. In *Wileman Bros.*, this Court upheld a California tree fruit promotion program on the basis that the promotions were part and parcel of a unique program of economic regulation governing an already collectivized industry. Compelled collective speech is sometimes essential to effectuate an existing cooperative endeavor—like collective bargaining or the cooperative marketing and sale of tree fruit. Such speech satisfies the germaneness test.

Because the mushroom market (like the beef market) is fully competitive and individualized, the Court in *United Foods* concluded that the mushroom promotions were not necessary to achieve an important, non-speech regulatory purpose. The Court explained:

> The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, * * * there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is

> speech itself * * *. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance.

533 U.S. at 415.

There is no material difference between the programs at issue here and in *United Foods*. Like the mushroom industry, the beef industry is highly competitive, decentralized, and economically unregulated. As the district court found,

> Clearly, the principal object of the beef checkoff program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regulatory purpose.

207 F. Supp. 2d at 1002. The court of appeals affirmed this finding, see Pet. App. 11a, and this Court should not second-guess it. See *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984) ("In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals.").[10] The promotions fail the germaneness test.

Moreover, the Beef Act cannot satisfy either of *Abood*'s *other* two requirements, as framed in *Lehnert*: that compelled

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[10] Petitioners repeatedly ask this Court to ignore its longstanding two-court rule, alleging that various factual findings of the district court (all of which were affirmed by the court of appeals) are not "supported by the record." See, *e.g.*, Nebraska Cattlemen Br. 33. Their assertions are wrong, but more fundamentally, they ask this Court to engage in a task to which the courts of appeals are far better suited: close scrutiny of the trial record. The court of appeals engaged in just such scrutiny here and found the district court's conclusions well supported.

financing of the speech be justified by "a vital policy interest" *and* that it "not significantly add to the burdening of free speech that is inherent in" the nonspeech program to which the speech is germane. 500 U.S. at 519. These requirements are stricter than the parallel "substantial interest" and "narrow tailoring" requirements applied in some of this Court's commercial speech precedents—and, in Section III.B below, we demonstrate that the Beef Act violates even those less stringent requirements. *A fortiori*, the Beef Act cannot survive *Abood*'s compelled speech and compelled association analysis.

B. The Program's Attribution Of The Speech Funded By Respondents To Beef Producers Rather Than The Government Amounts To Unconstitutional Compelled Speech And Association, And Defeats Any "Government Speech" Defense.

1. An essential principle reflected in this Court's compelled speech and expressive association cases is that persons have a right not to be associated involuntarily with speech that they do not wish to support. Whether one is involuntarily associated with a message turns in large part on the likely attribution of that message by its recipients. When the audience is likely to attribute speech to a private person who has been involuntarily conscripted, that private person's First Amendment rights are abridged—and the "government speech" label is unavailing, because in no meaningful sense can the government then be described as speaking on its own behalf.

This is such a case. The television and print ads produced by the Beef Board are all expressly attributed to "America's beef producers," and nowhere is this attribution even qualified by the suggestion that the message might be mandated by the government. And, beyond this express attribution, because the promotions advertise a commercial product and are aired or displayed in venues and in formats normally used for commercial advertising, they are far more

likely to be perceived as representing the views of commercial beef producers than those of the government. Some of the promotions even involve joint advertising ventures with commercial restaurant chains—not, to say the least, indicative of governmental authorship. See *Amicus* Brief of Public Citizen Part II.B (discussing campaign advertising beef subs by restaurant chain Quizno's).[11] As discussed in Sections II.A and II.C, the Beef Board's own website and other materials affirmatively emphasize the industry's control and funding of the promotions, further dissociating the government from the message in the public mind.

This Court's compelled speech cases rightly emphasize the significance of public attribution. In its student activity fee cases, for example, the Court has emphasized that a school's "adherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'" *Southworth*, 529 U.S. at 233 (quoting *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995)). Similarly, in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), the Court upheld governmental must-carry provisions imposed on cable operators, reasoning that "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655. In *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), addressing the question whether the state could require the private organizers of a parade to permit a gay and lesbian group to participate, the Court distinguished *Turner* on the basis that parade displays may easily be per-

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[11] See also, *e.g.*, Beef Board, *Beef Industry To Help Launch Pizza Ranch® Steak Pizzas*, CHECKOFF NEWS, Jan. 26, 2004; Beef Board, *Ground Round Grill & Bar® Teams With Beef Checkoff*, CHECKOFF NEWS, Jan. 28, 2004; http://www.Beefboard.com/dsp/dsp_locationContent.cfm?locationId=1054 (listing similar releases).

ceived as reflecting the opinions of the organizer, even when that perception is false. *Id.* at 576; see also *Pruneyard Shopping Center*, 447 U.S. at 87 (deeming "most important" the fact that the "views expressed by members of the public in passing out pamphlets * * * will not likely be identified with those of the owner" of the shopping mall).

2. In addition to abridging free speech rights, the Beef Act violates the objectors' First Amendment right to expressive association. State interferences with the right *not* to associate for expressive purposes are subject to strict scrutiny. See *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-48 (2000); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984). Here the Beef Board plainly "engages in 'expressive association,'" *Boy Scouts*, 530 U.S. at 649; indeed, its primary *purpose* is expressive. When an expressive organization like the Beef Board attributes its speech publicly to the very producers who are compelled to support that speech financially, those producers' First Amendment rights of expressive association are infringed. This Court's expressive association cases have emphasized public perceptions even when the likelihood that the public will infer that objectors support a message is significantly lower than it is in this case, in which the misleading attribution is plastered across viewers' television screens. See, *e.g.*, *id.* at 653 (considering the message sent to the public by an organization's conspicuously involuntary affiliation with an individual); see also *infra* Section II.C (further developing the expressive association argument as a reason why the Beef Act's funding mechanism is unconstitutional).

3. Public perception is critical to the central rationale underlying this Court's "government speech" cases: that the *political process*, not judicial enforcement of the Constitution, is the most appropriate check on abuses of the government's power to speak. The Court in *Southworth* thus explained:

> When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the

> end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

Id. at 235. As one commentator further explains, "[w]hen it is *clear that the government is talking*, its discretion to discriminate among the topics and viewpoints that it presents is very broad. This broad discretion * * * [reflects] the democratic ideal of a government responsive to the will of the people who created it." Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 40-41 (2002) (emphasis added).

Political checks on governmental abuses of the power to speak are unlikely to be effective if the speech in question is not readily *perceived* to be the government's. The government's use of private actors to advance what is actually the government's own message is far more insidious from a First Amendment perspective than is the government's practice of openly speaking on its own behalf—a danger that argues for *heightened* First Amendment scrutiny when governmental- and private speech are intertwined, or at least for recognition that, in such situations, the resulting interference with the First Amendment rights of private persons should be fully subject to the limits imposed by this Court's compelled speech cases.

C. The Act's Financing Mechanism Unconstitutionally Compels Speech And Expressive Association, And Precludes Any "Government Speech" Defense.

1. The Beef Act's compelled financing mechanism severely burdens respondents' First Amendment rights by forcing them to provide financial support to speech with which they disagree. As this Court has long recognized, contributing money has well-recognized significance in terms of freedom of expression and association. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 124 S. Ct. 619, 711 (2003) (Rehnquist,

C.J., for the Court) ("Limitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association."); *id.*, 124 S. Ct. at 723 (Scalia, J., dissenting) (citing cases for the proposition that "an attack upon the funding of speech is an attack upon speech itself"); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (observing that, even though money merely "enables speech," it cannot be gainsaid that "[b]oth political association and political communication are at stake" in regulation of campaign contributions). The rights of individuals to fund speech that expresses their views and *not* to fund speech that does not do so are two sides of exactly the same First Amendment coin. Requiring beef producers to pay for the generic promotions as the price of continuing to practice their livelihoods therefore puts objecting producers to a choice—"Either abandon your chosen occupation, or pay for speech with which you disagree"—that is anathema to the First Amendment.

Compelled funding also directly abridges respondents' freedom of expressive association. In *Abood*, for example, the right of employees to refuse to associate with a union, absent an expressive component in the association, was deemed entitled to little constitutional protection and was trumped by the strong interest in making collective bargaining possible by preventing unions from being undermined by the prevalence of free-riders. But because the unions' *expressive* activities implicated nonmembers' rights "to associate for the purpose of advancing beliefs and ideas," *much* more stringent scrutiny applied: payments could be compelled only for those activities demonstrably "germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 233, 235.

Notably, *Abood* held that the right of expressive association was at stake even though objecting employees were not compelled to *join* the union—just to support it financially though the payment of agency fees. For purposes of compelled speech and expressive association analysis, the agency shop arrangement was constitutionally equivalent to the union

shop arrangements at issue in *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), and *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), in which membership had been compelled. See *Abood*, 431 U.S. at 219 n.10 ("[This case, like *Hanson*, is] concerned simply with the requirement of financial support for the union, [not] the additional requirement * * * that each employee formally join the union * * *."); see also *Lehnert*, 500 U.S. at 514-15. *Abood* and its progeny thus reflect the principle that the right to refuse to join an organization does not sufficiently protect a person's freedom of expressive association if that person is nonetheless forced to help pay for the organization's expressive activities. This holds especially true when the organization is one that—as with a union or industry association—claims to *represent* those who are forced to pay, for such cases present a special risk that the organization's speech will be attributed by the public to those whom the organization purportedly represents.

When the government funds its own speech through general tax revenues, no such constitutionally problematic compelled speech or compelled expressive association results. An expressive program that is funded from such tax revenues does not thereby become associated with any particular group of people; the source of the taxes is far too diffuse. But an expressive program paid for by a narrower group is much more likely to be perceived as associated with the members of that group. Cf. *Frothingham* v. *Mellon*, 262 U.S. 447, 486-87 (1923) ("The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate * * * But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury * * * is shared with millions of others; is comparatively minute and indeterminable * * *."). Petitioners' hyperbolic assertions that respondents' position would incapacitate the government are thus plainly without foundation.

2. The way expressive activities are funded has accordingly played a central role in the Court's "government

speech" jurisprudence. For example, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), when the Court addressed the permissibility of certain restrictions on what family planning clinics could say without losing their federal funding, only the fact of government funding sufficed to remove First Amendment protection from what would otherwise have been protected, private speech: doctors' advice to their patients.[12] Conversely, in *Keller* v. *State Bar of California*, 496 U.S. 1, 11 (1990), the fact that the California State Bar Association was funded not by general tax revenues but by fees that only lawyers were required to pay was critical to this Court's determination that the Association was not a governmental entity for the purpose of the government speech doctrine. 496 U.S. at 11. See also *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983) (upholding restriction on lobbying by § 501(c)(3) organizations as a simple refusal to "pay for the lobbying out of public moneys" when those organizations were free to create separate, privately funded § 501(c)(4) lobbying arms).

Cases such as *Rust* and *Taxation with Representation* involve claims of impermissible restriction on the speech at issue, while *Keller* involved a challenge to compelled financing of speech. In both contexts, public funding has been a necessary criterion for the success of a government speech defense. When the speech is funded by the government through gen-

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[12] Indeed, the Court emphasized that the First Amendment *does* protect the doctors' right to advise their patients, even if they participate in the program, so long as they do not use government funds to do so. The Court in *Rust* never actually used the language of "government speech"; its holding turned on the fact that the doctors' speech was neither compelled nor substantially limited by the voluntary and relatively non-restrictive subsidy program. The fact that later cases have treated *Rust* as the seminal "government speech" doctrine case simply demonstrates that the core concern of that doctrine is with letting the government use *its own funds* to support whatever messages it chooses to disseminate. See, *e.g.*, *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001).

eral tax revenues, content restrictions have sometimes, but not always, been upheld.[13] But this Court has *never* recognized a government speech defense when the speech in question was *not* funded by taxpayers. In *Keller*, the case that most directly presented the question, the Court relied heavily on the funding factor in concluding that the bar association's speech was not governmental. The Court reasoned:

> The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." *Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors.* Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members.

496 U.S. at 11 (footnote omitted) (emphasis added). This case is indistinguishable: The beef promotion program is funded not from Congressional appropriations, but by mandatory payments that all members of the beef industry must make to their respective state beef industry associations.[14]

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[13] Subsidies from the public fisc do not, of course, *invariably* suffice to insulate control over the content of subsidized speech from First Amendment scrutiny. Rather, they are necessary but not sufficient for a government speech defense to succeed. When such subsidies are not given for the express purpose of promoting a particular government message, but simply to create a forum for private speech or to fund speech on behalf of some private person (like a lawyer's client), this Court has refused to recognize a government speech defense. See *Velazquez*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833-34.

[14] *Keller* is, indeed, devastating to petitioners' argument. Petitioners bizarrely contend that *Keller* supports them because the Court considered whether the bar's speech was governmental before applying compelled speech analysis—supporting, they claim, the notion that compelled financial support from a narrow group of

Similarly, in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), in which a student activities funding policy was challenged by students who objected to paying the mandatory fee rather than (as in *Rosenberger*, 515 U.S. 819) by student groups excluded from its payouts, this Court refused to apply the government speech doctrine. As petitioners observe, the Court relied in part on the university's lack of control over the content of student speech; but, the Court *also* relied on the fact that payments came not from taxes or tuition[15] but from compelled student activity fees. 529 U.S. at 229 ("If the challenged speech here were *financed by tuition dollars* and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." (emphasis added)); see also *id.* at 222-23, 234 (emphasizing that the fee was "segregated" from tuition charges). As *Southworth* shows, even the distinction between student activity fees and tuition—a far subtler distinction between funding mechanisms than the major difference at issue in this case—can decide the applicability of a government speech defense.

3. Financing by a narrow group also increases the likelihood that others will perceive the speech as private rather than governmental. See *United States* v. *Frame*, 885 F.2d 1119, 1132 (CA3 1989) (describing the Beef Act's "funding scheme, with its close nexus between the individual and the

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private persons would be permissible if the speech *were* governmental. See U.S. Br. 26; Nebraska Cattlemen Br. 30. That reading, of course, ignores *Keller's* holding that speech *cannot be deemed governmental* in the first place, notwithstanding governmental control of the entity speaking, if it is funded through compelled financial support by a narrow group of private persons. Thus, petitioners read *Keller* to stand for a proposition that is essentially the opposite of its actual holding.

[15] Tuition is a form of user fee assessed as the price of voluntary use of a government service, and as such (like general taxation) does not raise a compelled speech problem. See *infra* Part II.D.

message funded"); see also *Southworth*, 529 U.S. at 240 (Souter, J., concurring in the judgment) (distinguishing agency fees on the basis that, in the case of student activity fees, the "relationship between the fee payer and the ultimately objectionable expression is far more attenuated" than when union members are "required to join or at least drop money in the coffers of the very organization promoting messages subject to objection," thereby creating a "clear connection between fee payer and offensive speech"); Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2423 (2004) (arguing that in *Keller*, the "fees were the nexus that associated the speech at issue with the protesting parties").

4. Here, however, because the public does not foot the bill, the Beef Act's narrow funding mechanism shuts down the crucial political safeguard provided by taxpayers' scrutiny of the government's use of their money. See *Southworth*, 529 U.S. at 229 (referring to "traditional political controls to ensure responsible government action"); *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.").

Indeed, one of the government's arguments *in favor* of the checkoff requirement dramatically, if inadvertently, proves this point: The government contends that, if the beef promotion program were funded by tax revenues, a public backlash would be likely. U.S. Br. at 41.[16] And the Beef

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[16] The Beef Act's referendum mechanism does not provide an analogous political safeguard. Contra, *e.g.*, Nebraska Cattlemen Br. 39 n.8. First, it is ineffectual. In this case, the Beef Board fought respondents' push for a referendum using checkoff funds, and when the petition drive was nonetheless successful, the Secretary failed to organize a referendum anyway. In 2000, a majority of

Board's own web site (a dot-*com*, not a dot-*gov*) trumpets the fact that the Board receives "no government funds," presumably to reassure taxpayers that their money is not being wasted. On the Board's Frequently Asked Questions page, one finds this revealing colloquy:

> Who pays for the checkoff?
>
> Each checkoff program is supported entirely by its respective industry, which could include U.S. producers, processors, handlers and importers. NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED.").
>
> * * *
>
> Do checkoff programs receive government assistance?
>
> No. Checkoffs are funded entirely by their respective industries, NOT by taxpayers or government agencies.

See http://www.beefboard.com/dsp/dsp_locationContent.cfm?locationId=1062 (last visited Sept. 24, 2004) (capitals in original).

When the political checks on government decisions to disseminate messages are absent, no "government speech" defense is justifiable; to the contrary, government speech

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pork producers voted in a referendum to eliminate the pork promotion program, but in 2001 the new administration disregarded the result of the referendum and simply continued the program.

More fundamentally, accountability to a particular industry group is not the kind of democratic accountability that this Court's government speech cases contemplate. In a democracy, the government should speak for the majority of its citizens. It is a distortion of democracy for the government to speak for just a majority within a particular special interest group—or, as here, for a particularly influential minority even within that group. (Although the government may often serve special interests, it is ultimately accountable to the public when it spends the public's money in doing so.) And only the public as a whole provides the ultimate check on abuse of government authority—voting the public's representatives out of office.

structured to evade political accountability poses distinct dangers that, in a democracy, should invite not more *relaxed* but *closer* judicial scrutiny. Cf. *FCC* v. *League of Women Voters*, 468 U.S. 364, 416 (1984) (Stevens, J., dissenting) ("[T]he interest in keeping the Federal Government out of the propaganda arena is of overriding importance. * * * Congress enacted many safeguards because the evil to be avoided was so grave. Organs of official propaganda are antithetical to this Nation's heritage, and Congress understandably acted with great caution in this area."); *Barnette*, 319 U.S. at 641 ("Authority here is to be controlled by public opinion, not public opinion by authority.").[17]

II. The Beef Act Cannot Be Saved On The Ground That The Government Supposedly Controls The Content Of The Promotions.

Petitioners' sole argument for exempting the Beef Act from First Amendment scrutiny as merely a vehicle for "government speech" is the degree of governmental control over the beef ads' content. See, *e.g.*, U.S. Br. 20 ("A program involves government speech when the government controls the content of the speech that is disseminated under it."); Nebraska Cattlemen Br. 28. Petitioners argue that Congress au-

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[17] In another example of its surreal logic, the government contends that the very fact that producers are compelled to contribute "reinforces the conclusion that Beef Act speech is government speech" because Congress has "assumed responsibility for ensuring that it is funded." U.S. Br. 33. Again, the argument runs, the more the government imposes on private citizens' First Amendment rights, the *less* constitutional scrutiny should apply! This argument is utter nonsense. Had Congress funded the program through the U.S. Treasury, that would have been a meaningful assumption of "responsibility," for which Congress would have been politically accountable; imposing the cost on a narrow group of private citizens is nothing more than a *dodge* of responsibility. The Beef Act in fact *forbids* public funding of the program, making it entirely dependent on the funds raised through the checkoff.

thorized the program through passage of the Beef Act and set parameters for the promotions' message; that the Secretary of Agriculture has certain oversight responsibilities; and that the Beef Board, which implements the Act, constitutes a "governmental entity," citing *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). For several reasons, these arguments are unavailing.

1. As amply demonstrated in the Statement of the Case, *supra* at 3-5, the factual premise for petitioners' argument is simply wrong: the government's control over the content of Beef Act promotions is merely *pro forma*. Congress specified the message to be promoted only in the loosest sense—essentially, anything is permissible, as long as the industry representatives who control the program decide that it will advance the interests of the industry.[18] That form of "control" of the message—"You're permitted to say only what you want to say"—is not control at all. As for the Beef Board itself, its members are private industry representatives approved in slate fashion by the Secretary; the Operating Committee, the entity directly responsible for selecting the messages, is evenly divided between Beef Board members and members of the National Cattlemen's Beef Association, over whose appointment USDA has no discretion. See *supra* at 4. USDA loosely oversees compliance with the statute's conditions, but it does not initiate, create, devise, compose, fund, or implement any of the Board's activities. *Id.*

The district court accordingly found that USDA's control of the promotions' content is only ministerial, and that the speech is in practice privately controlled, a factual finding affirmed by the court of appeals and certainly entitled to deference here. *National Collegiate Athletic Ass'n.* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984). It also observed that

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[18] See 7 U.S.C. 2902(13) (promotions must "advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace").

the Beef Board *represents itself* as being entirely industry-controlled. Pet. App. 55a (Board publications describe it as a "producer-controlled, independent Board" and the beef checkoff as an "industry run program")—belying petitioners' contrary assertions in this Court, and further demonstrating that the beef promotions will certainly be attributed to producers rather than to the government.

Finally, even if the Beef Board *were* a government entity, NCBA—to which up to one-quarter of checkoff funds are sent *directly* by the beef councils that collect them, without passing through the Beef Board's control—indisputably is not. Similarly, some of the state beef councils, which collect all the checkoff funds and retain whatever portion they do not remit to the Beef Board and NCBA, are also wholly private; they are simply trade associations.[19] No "government speech" defense could possibly insulate a compulsion to associate with these private entities and to finance their speech from First Amendment scrutiny.

2. Even if the government did control the content of the beef promotions, that fact would not suffice to trigger a "government speech" defense. It cannot be the case that government control of the content of speech—that is, the fact that the government has effectively compelled and/or effectively regulated the speech—altogether immunizes the compulsion or regulation from constitutional scrutiny. Such a rule—which indeed is the essence of petitioners' argument—would take First Amendment doctrine through the looking glass: The more severe the government's censorship, the less scrutiny courts would afford. The fact that the state *controls* the speaker and the speech thus surely cannot suffice to show that the "State *is* the speaker," *Rosenberger*, 515 U.S. at 833 (em-

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[19] See, *e.g.*, Alabama Cattlemen's Association, *About Us*, http://www.bamabeef.org/about_us1.htm (last visited October 15, 2004). State beef councils take a variety of forms; some are totally unaffiliated with the state government, while others have some degree of affiliation.

phasis added), nor to explain why a requirement that private persons fund the speech should be immune from First Amendment scrutiny.

Indeed, *Keller* demonstrates that extensive governmental control cannot be dispositive. The Supreme Court of California had held in that case that the state bar was "governmental"—citing, among other things, its "status as a public corporation" and noting an "extensive degree of legislative involvement and regulation" exceeding that found in other state bar associations. See 496 U.S. at 7; see also *Keller* v. *State Bar*, 767 P.2d 1020, 1023-25 (Cal. 1989) (explaining that the state bar was created by act of the state legislature; had a statutorily defined purpose; and functioned as an "administrative assistant or adjunct to" the state supreme court).

This Court, reversing that court's judgment that the bar's speech was immune from constitutional scrutiny as "government speech," held that these factors did not control. Instead, the Court cited three factors in support of its refusal to apply the "government speech" label: that the bar association was funded through bar fees rather than general tax revenues; that its membership was limited to lawyers and that it therefore did not represent the public as a whole; and that it had no power to admit lawyers to practice in the state courts. 496 U.S. at 10-12. All three factors likewise point to the conclusion that the Beef Board's promotions are not entitled to the protections of the "government speech" defense: The promotions are funded through a targeted assessment on industry members; the Board is limited to representatives of a specific industry, and therefore is not "expected as a part of the democratic process to represent and to espouse the views of a majority of * * * constituents," *id.* at 12; see Nebraska Cattlemen Br. 35; and the Beef Board's powers over industry practices are even more limited than those of the State Bar—it is forbidden even to *attempt* to influence government policy regarding beef regulation. See 7 U.S.C. 2904(10). The Beef Board is no more "governmental" than is the State Bar of

California; indeed, it is probably less so. *Keller* cannot be meaningfully distinguished.[20]

Keller also shows why *Lebron* is easily distinguishable. *Lebron* addressed the question whether Amtrak could discriminate based on content in leasing billboard space in its stations—*i.e.*, whether Amtrak was a governmental entity for the purpose of *subjecting* its actions *to* the First Amendment, not for the purpose of *insulating* those actions *from* the First Amendment. The Court held that Amtrak was governmental only for the former purpose. 513 U.S. at 386-91. And, despite petitioners' assertions, the definition of "governmental" is not identical for these two purposes. See U.S. Br. 34. Notably, although a state bar association is not governmental in any sense that would allow it to use its members' fees for non-germane expressive activities, see *Keller*, 496 U.S. 1, 11-12 (1990), it *is* governmental in the sense that it must abide by certain constitutional restrictions, including the First

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[20] Petitioners Nebraska Cattlemen argue (at 36) that Congress exercises more control over the message of the beef ads than did the California state legislature in *Keller*. This argument is wrong for several reasons. First, if petitioners were right about what criteria identify an institution as governmental, then the State Bar would itself have been a governmental entity—and so it would have made no *difference* whether the state legislature or the Bar itself controlled its messages. No special status attaches to "governmental" speech that is *legislatively* controlled rather than controlled by some other branch of government. Second, Congress in the Beef Act set forth only very general parameters for the beef promotions' message—not very different from the California State Bar's legislative directive to engage in expression and other activities designed to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 767 P.2d at 1024. Third, and most importantly, this Court did not emphasize or even mention the State Bar's freedom in shaping its messages as a reason the Bar could not be considered "governmental." It relied only on the above-listed factors, all of which apply equally to the Beef Board. See 496 U.S. at 11, 13.

Amendment. See, *e.g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 8 (1971) (state bar's requirement that applicants identify their party affiliation violates the First Amendment); cf. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975) (the fact that "[t]he State Bar is a state agency for some limited purposes" does not make it one for *all* purposes).

3. Even if Beef Act promotions were labeled "government speech," the compelled financing mechanism would thus still be subject to First Amendment scrutiny. This Court's seminal compelled speech case, *West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943), involved a message—the Pledge of Allegiance—that was clearly "government speech" in that, although physically spoken by private individuals, it was drafted and adopted by Congress and implemented largely through governmental (teacher) demands that students recite it *en masse*. In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), which struck down a requirement that all New Hampshire license plates display the state's motto, the governmental component of the speech—creating the motto, manufacturing and distributing the plates, and requiring their use—is even more obvious.

As these cases show, the compelled speech doctrine *originated* in response to compelled *private participation* in *government* speech. Only later—in *Abood*, which followed *Wooley* and *Barnette*—was the doctrine extended to compelled support of *private* speech. The standard of scrutiny in this case should thus be *at least* as strict as the standard the Court has applied to compelled support of private speech—that is, the *Abood* germaneness test.

Indeed, there is a strong argument that a law compelling private speakers to support and associate themselves with government speech should be subject to *stricter* constitutional scrutiny than one that compels them to support private speech. No value is more central to First Amendment doctrine—one could fairly describe it as the reason we *have* the First Amendment—than the freedom of private speakers to

dissociate themselves from the government: to criticize its policies through speech or in the press, to petition for a change in those policies, to practice religion free from its interference, and, critically, to disagree with its chosen messages. This Court has held that the First Amendment protects even the right to advocate *violence* against the government, absent incitement of imminent lawlessness. See *Brandenburg* v. *Ohio*, 395 U.S. 444, 448-49 (1969). Surely, then, it also protects against the government's ability to compel private citizens to provide affirmative support for the government's message—whether that support takes the form of speaking a pledge, see *Barnette*, 319 U.S. 624, signing an oath, see *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 447-49 (1974), or, as here, contributing money.

This Court has recognized that government control of the message *heightens* constitutional concerns in contexts involving not compulsion literally to speak or write, but rather to provide support for the speech physically uttered by others. In *Pruneyard Shopping Center.* v. *Robins*, 447 U.S. 74, 87 (1980), the Court upheld a state constitutional provision requiring private shopping malls to permit patrons to express their own views. Distinguishing *Wooley*, this Court deemed such compulsion to support private speech permissible in part because "no specific message [was] dictated by the State."

4. Finally, petitioners' notion that government control could completely insulate a program involving speech from First Amendment scrutiny relies on a dichotomy between "governmental" and "private" speech that is too simplistic to be helpful. Many expressive activities convey a government message but nonetheless involve private speakers in a way that plainly implicates those speakers' First Amendment rights. The government thus places inordinate weight on the classification of speech as *either* governmental *or* private, ignoring the reality that much speech is not readily categorized as either. The government's binary approach reflects, to be sure, that taken by many lower courts—but it is not required by this Court's precedent, and it has been justifiably criti-

cized. In a recent opinion respecting the denial of rehearing en banc, Judge Luttig expressed the hope that this Court would one day make clear that certain kinds of speech can be *both* governmental in an important sense *and* sufficiently involved with private speakers' interests to require First Amendment scrutiny. *Sons of Confederate Veterans, Inc.* v. *Comm'r of the Va. DMV*, 305 F.3d 241, 244-47 (CA4 2002) (Luttig, J.). As Judge Luttig noted, the government speech doctrine is in its infancy and has not yet been elaborately articulated; this Court's recognition of the frequent intertwining of government and private speech would not result in any inconsistency with this Court's precedent.

Such a clarification would help make sense of the relationship between the government speech and compelled speech doctrines. To the extent that such "hybrid" speech situations implicate private speakers' First Amendment interests, First Amendment scrutiny should apply—but only to that extent. Here, assuming *arguendo* that the Beef Board and Operating Committee are governmental institutions, the compelled checkoff payments and the attribution of the ads to "America's beef producers" nonetheless interfere with important *private* speech interests: the rights of objectors not to support or be publicly associated with speech with which they disagree. Thus, First Amendment scrutiny would apply to the questions (a) whether and to what extent checkoff payments may be compelled; and (b) whether the ads must publicly associate themselves with the government and dissociate themselves from the objectors. The *governmental* aspects of the speech—most notably, the government's choice of the message—would not be constrained by the First Amendment. This analysis would permit commodity promotion programs to continue to operate, but would not permit the government to compel objectors to support those programs or to attribute the promotions falsely to private producers.

III. Respondents' Approach Does Not "Eviscerate The Government Speech Doctrine."

Contrary to petitioners' hyperbolic assertions, the First Amendment scrutiny that respondents urge would leave intact government's ability to compel support in appropriate ways for the costs of government speech. Even beyond the plainly permissible use of general tax revenues, some targeted mandatory assessments designed to support government speech could almost certainly withstand the applicable level of First Amendment scrutiny, or even escape such scrutiny altogether. We consider here two of the examples petitioners raise: the use of cigarette sales taxes to fund anti-tobacco advertisement, and public universities' charging of tuition.[21] Most of their other examples involve user fees assessed as the price of government services, and are similar to university tuition.

1. Cigarette Sales Taxes

One form of targeted assessment that might validly be used to fund government speech is a tax on sales of dangerous products such as cigarettes, when the revenues are used to fund the government's public health messages about the product's dangers. See *R.J. Reynolds Tobacco Co.* v. *Shewry*, No. 03-16535, 2004 U.S. App. LEXIS 20369 (CA9 Sept. 28, 2004);[22] *Amicus* Br. of Michigan Pork Producers 12-13.

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[21] Invalidating the Beef Act's coerced support of speech would obviously pose no threat to targeted assessments that are used for non-speech purposes, such as the requirement that litigants "pay a filing fee in order to offset some of the court's operating costs." U.S. Br. 30; *id.* at 30-31 (also citing, *e.g.*, parade permits); Nebraska Cattlemen Br. 38-39 & n.7. The government concedes this crucial flaw in its argument. See *id.* at 31 ("The cases discussed above do not involve assessments to support government speech programs.").

[22] In *Shewry*, the court of appeals deemed the California government's use of cigarette tax revenues to fund anti-tobacco ads to be permissible government speech. The court misleadingly suggested that the labeling of speech as "governmental" turns entirely

A principal difference between such taxes and the beef checkoff is that, whereas Beef Act promotions are expressly attributed to producers, few viewers would attribute anti-smoking ads, for example, to *smokers*, the parties upon whom cigarette taxes are normally assessed. And even if such a tax were assessed on the cigarette companies rather than on the smokers, the public still would not attribute the message to the companies, inasmuch as that message is transparently against their interests. See *Shewry*, 2004 U.S. App. LEXIS 20369, at *29 (distinguishing a prior case concerning the Beef Act, on the ground that the anti-tobacco ads "are also clearly identified as coming from the government itself and not from the tobacco companies, the tobacco industry or any other private party or group"). Nor does a cigarette tax force the payers to associate themselves for expressive purposes with an organization, akin to the NCBA or the Beef Board, that purportedly represents them.

In any event, a cigarette tax might well survive First Amendment scrutiny even if the "government speech" defense did not apply.[23] The *Abood* test might be satisfied be-

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on government control of its content. 2004 U.S. App. LEXIS 20369, at *25. But the court nonetheless properly distinguished this case, noting that its rationale—which emphasized that the advertisements in question were unquestionably governmental, and clearly attributable to the government—did not apply to commodity promotion programs in which "the government nominally controls the production of advertisements, but as a practical matter has delegated control over the speech to a particular group that represents only one segment of the population." *Id.* at *27.

[23] Cigarette taxes that fund anti-smoking ads might also survive First Amendment scrutiny because of the magnitude of the government's interest in preventing smoking among children, see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 564 (2001), or because they closely resemble requirements, already upheld by this Court, that those who disseminate certain types of promotional messages include information that protects the purchasing public from being dangerously misled. See *Zauderer* v. *Office of Disci-*

cause such taxes serve an important function having nothing to do with expression: By increasing prices, taxes discourage people from buying cigarettes. A cigarette tax that is used to fund anti-tobacco ads thus does not suffer from the problem that plagues commodity promotion programs under the *Abood* analysis—namely, that such programs have no non-speech purpose. *United Foods*, 533 U.S. at 415.[24]

2. Tuition and Other User Fees

The government asserts that applying First Amendment scrutiny to compelled support of government speech would threaten such things as state universities' ability to fund their courses by charging students tuition. U.S. Br. 28. Whatever limits, if any, the First Amendment might impose on the expenditure of tuition dollars on expressive university activities—a question left open by this Court, see *Southworth*, 529 U.S. at 229—public universities may undoubtedly use tuition to fund course offerings, and a decision striking down the Beef Act would not jeopardize that ability.[25] Among other

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plinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985); *Meese* v. *Keene*, 481 U.S. 465, 480-82 (1987).

[24] Moreover, even if the government were unable to require cigarette companies to pay for anti-smoking advertisements, such a result would not substantially undermine today's public health activities. Tobacco company payments for anti-tobacco advertising have primarily occurred pursuant to legal settlements in healthcare liability cases—most notably, the 1997 nationwide settlement that established and funded the American Legacy Foundation, which produces major nationwide anti-smoking campaigns. See http://www.americanlegacy.org. No First Amendment theory would preclude such voluntary agreements.

[25] A threshold problem with petitioners' logic is that the expression that takes place in public university courses is generally understood to be the private speech of professors (and of the students who participate in class discussions); as this Court has often recognized, "academic freedom * * * long has been viewed as a special concern of the First Amendment." *Grutter* v. *Bollinger*, 539 U.S. 306, 324 (2003) (citing *Regents of Univ. of Calif.* v.

things, tuition charges involve no constitutionally problematic compulsion: university tuition, like museum entry fees or airport security fees, see *Amicus* Br. of Michigan Pork Producers 11; see also *id.* at 12 (discussing fees paid by drug manufacturers seeking FDA approval of a new drug), is assessed only upon those who voluntarily avail themselves of a government service. Students decide to pay the tuition in order to attend a state university with full knowledge that their money will be used to fund course offerings. A student who does not like a university's menu of course offerings is free not to enroll, just as a museumgoer who does not like the museum's exhibits is free not to visit.[26]

To be sure, respondents also have a choice: they can pay the checkoff, or they can stop raising and selling beef. But even in an era that gives no preferred place to economic lib-

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Bakke, 438 U.S. 265, 312 (1978) (Powell, J.)); see, *e.g.*, *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 249-50 (1957). The ability of state universities to use tuition to fund course offerings therefore cannot be grounded principally in the government speech doctrine; much of the speech that tuition funds is plainly private speech that is itself entitled to First Amendment protection.

[26] This Court distinguished in *Southworth* between tuition and student activity fees, 529 U.S. at 239, a distinction best understood in terms of what the fee is assessed *for* and whether the payer has a corresponding capacity to refuse to pay. While tuition is assessed as the price of attending school, an activity fee is not—it is expressly tacked on *above* that price, and is earmarked for a special program that encompasses expression. A student who disagrees with that expression cannot simply opt out of the program; her only remedy—leaving school altogether—does not correspond to the interference with First Amendment rights, and is so disproportionate as to be an ineffective remedy. This distinction suggests that there *might* be limits on a university's use of tuition dollars. Use of tuition to finance a political campaign, for example, might give rise to a valid First Amendment claim, because that expenditure would be unrelated to the service students thought they were paying for.

erty, this is a choice that the First Amendment forbids the government to impose.[27] Cf. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 824, 833 n.2 (1987). The decision to produce a lawful commodity as one's means of livelihood remains a facet of "liberty" that cannot be equated with voluntary use of a government service. And the decision to *remain* such a producer is even more clearly distinguishable: at the time the beef checkoff was instituted in 1985, many of today's beef producers had pursued that occupation for most of their lives, or kept ranches in their families for generations. Participation in the checkoff program was in no sense what they had bargained for by choosing that occupation.

This Court should therefore resist the characterization of tuition charges as simply "reflect[ing] the common-sense notion that the costs of a university's offerings should be borne by those who benefit from them most directly," a rationale the government urges the Court to extend to the beef checkoff program. U.S. Br. 29. That extension would elide the crucial distinction between those who freely avail themselves of an optional government service and those who are paternalistically forced to "benefit from" an expressive program they do not deem to be in their benefit.

Moreover, a student's payment of tuition would never be perceived as an endorsement of the views of university professors' views, nor museum fees as a visitor's endorsement of the museum's exhibits. Cf. *Heffron* v. *Internat'l Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981). In sharp

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[27] So, for example, state universities may charge in-state residents reduced or no tuition without running afoul of the Privileges and Immunities Clause, *Martinez* v. *Bynum*, 461 U.S. 321, 327-28 (1983), but states may not exclude nonresidents from the bar or from any other "means of a livelihood." *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279 (1985); see also, *e.g.*, *McKune* v. *Lile*, 536 U.S. 24, 40 (2002) (persons other than prisoners may not be forced to choose "between invoking the Fifth Amendment privilege and sustaining their economic livelihood").

contrast, the beef ads are quite certain to be attributed to the beef producers who pay for them.

A final distinction lies in the applicability and application of the *Abood* germaneness test. This Court in *Southworth* held that test uniquely inappropriate to the university setting, and instead imposed a viewpoint neutrality standard. 529 U.S. at 230-31. In other user fee contexts, the *Abood* test would probably be *satisfied* even if the fees were treated as compulsory and subjected to First Amendment scrutiny. For example, the deliberations of an FDA advisory board reviewing a new drug application are plainly germane to FDA's valid non-speech purpose of regulating drug safety; it is impossible for FDA to implement its regulations without those communications, just as it is impossible for labor unions to represent employees effectively if they cannot communicate their ideas to management in the collective bargaining process. See *Amicus* Br. of Michigan Pork Producers 12.[28]

IV. The Beef Act Cannot Withstand Constitutional Scrutiny Under This Court's Commercial Speech Cases.

The government's alternative argument is that, even if the government speech doctrine is inapplicable, the Beef Act survives First Amendment scrutiny under the commercial speech standards of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). But this Court has applied the *Central Hudson* test only in circumstances that implicate the *reasons* for supposing that commercial

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[28] Airport security fees, assessed as the price of voluntary use of a government service and used to fund government-mandated security messages in airports, furnish another example in which the *Abood* test would be easily satisfied. *Amicus* Br. of Michigan Pork Producers 11. The government cannot enforce a regulation barring knives or flammable materials on planes unless it can communicate the existence of those bans to passengers—for example, through signs with lists or pictures of banned items. Posting those signs would clearly be a valid use of a security fee, even if the assessment of the fee did count as compelled speech.

speech regulation (or compulsion) might sometimes merit less-than-strict First Amendment scrutiny, and this is not such a case. Moreover, in *United Foods*, this Court held that it did not need to resolve questions regarding the level of constitutional scrutiny in cases involving commercial speech, "for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 409. In light of *United Foods*'s square holding that the mushroom program, virtually identical to the beef checkoff, could not withstand even *Central Hudson* scrutiny, petitioners' argument is not substantial.

A. The *Central Hudson* Test Is Inapplicable.

Even accepting *arguendo* the view that the distinction between commercial and noncommercial speech is meaningful in some cases,[29] *Central Hudson* simply has no relevance

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[29] This Court has repeatedly expressed doubt about the *Central Hudson* test, acknowledging that a majority of Justices, albeit in concurring opinions, have now criticized it. See, *e.g.*, *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) (citing opinions written or joined by Justices Thomas, Stevens, Kennedy, Ginsburg, and Scalia); *Lorillard*, 533 U.S. at 544; *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 184 (1999); see also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630-48 (1990); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42, 54-55 (2000). As it did in *United Foods*, 533 U.S. at 410, this Court could avoid the issue here because the Beef Act checkoff program is plainly invalid even under *Central Hudson*. The Court may, however, decide finally to lay to rest a distinction that is dubious in principle and has proven problematic in practice. To do so would not contravene the principle of stare decisis: the above-cited cases demonstrate that *Central Hudson*'s value as precedent is plainly already in doubt, and the case has provided little guidance on which litigants and lower courts may reasonably rely, given the arbitrariness of its application. See Post, *supra*, at 42.

here. This Court's commercial speech cases have reasoned that regulation of speech is sometimes a necessary element of the government's role in regulating the buyer-seller relationship. When this rationale is inapposite, there is no basis for treating commercial speech differently from noncommercial speech. This Court held in *Cincinnati* v. *Discovery Network*:

> For if commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech.

507 U.S. 410, 416 n.11 (1993); see also *id.* at 418-23. See also *44 Liquormart* v. *Rhode Island*, 517 U.S. 484, 499-501 (1996) (Stevens, J.) (plurality) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *Lorillard*, 533 U.S. at 576 (Thomas, J., concurring in part and concurring in the judgment) ("Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category.").

The government vaguely suggests that some unspecified *lesser* level of scrutiny than *Central Hudson*'s might apply, U.S. Br. 39, because "a requirement to provide money for commercial speech increases the total amount of information available to consumers." But a program with any other funding mechanism could have gotten the same information to consumers, and the money saved by objectors could have been used to advertise their own products, providing consumers with a more diverse array of information. In any event, increasing information flow to consumers is obviously not the only reason to protect commercial speech; rather, the speakers' rights matter too.

This case implicates none of the policies underlying the commercial speech doctrine. Neither the beef promotion program itself nor the requirement that producers pay to support it is designed to protect consumers from false and misleading information or from any other form of harm specifically related to the nature of the buyer-seller relationship. Contrast *Zauderer*, 471 U.S. at 651. Nor does the required support of speech here relate to any of the other reasons this Court has cited for the commercial speech doctrine. The supposedly greater durability of commercial speech is obviously irrelevant, because what is at issue in compelled speech cases is not the *risk* that anyone will be *discouraged* from uttering protected speech, but the *certainty* that some individuals will be *forced* to support speech with which they disagree. Nor is the objective verifiability of a category of speech relevant to whether objectors may be compelled to support it. In any event, the beef promotions' assertions that beef is delicious and is "what's for dinner" hardly represent objective statements comparable, for example, to the price of a product at a particular store. Thus, because the beef checkoff program has absolutely no connection to the rationale underlying the commercial speech doctrine, *Central Hudson* is inapposite.

B. The Beef Program Cannot Satisfy The *Central Hudson* Test.

In any event, the Beef Act cannot satisfy *Central Hudson*. That case set forth the following four-part test for the constitutionality of certain commercial speech regulations:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask *whether the asserted governmental interest is substantial.* If both inquiries yield positive answers, we must determine whether the regulation *directly advances the governmental interest* asserted, and whether it is *not more extensive than is necessary* to serve that interest.

447 U.S. at 566 (emphases added). Only the second, third, and fourth steps of this analysis, emphasized above, are relevant here. The Beef Act fails all three.

Petitioners' analysis to the contrary is unconvincing. First, they focus primarily on whether the beef *advertising* directly advances a substantial governmental interest. U.S. Br. 39-40; Nebraska Cattlemen Br. 40-42. That is the wrong question. Rather, "the *compelled funding* for the advertising must pass First Amendment scrutiny." *United Foods*, 533 U.S. at 411 (emphasis added). Petitioners' discussion (U.S. Br. 39-40; Nebraska Cattlemen Br. 40-42) of the economic and nutritional importance of beef is therefore immaterial unless they can prove that the checkoff requirement advances "to a material degree" the government interests to which petitioners point, *Ibanez* v. *Florida Dep't of Bus. & Professional Regulation*, 512 U.S. 136 (1994), and that the requirement is no broader than necessary to do so. Petitioners' attempts to prove such necessity—based on a "free-rider" theory and the fear of taxpayer backlash—are hopelessly flawed.

1. Free Riders. Petitioners argue that compelled funding is necessary to address a supposedly substantial government interest in overcoming "a collective action/free rider problem that limits the incentive for any one producer to pay for generic advertising for beef." See U.S. Br. 40-41 (citing *Lehnert*, 500 U.S. at 519); Nebraska Cattlemen Br. 44-46. This argument is, first of all, a purely speculative, *ex post* rationalization, and thus cannot suffice under *Central Hudson*. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625-26 (1995) (*Central Hudson* cannot be satisfied by "mere speculation and conjecture"); see also *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357 (2002); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) ("anecdotal evidence and educated guesses" do not suffice). Neither petitioner cites any evidence that Congress *actually* imposed the checkoff requirement as a response to a free rider problem, nor that it even thought such a

problem existed.[30] Congress's findings, 7 U.S.C. 2901, relate no such concern. In *United States* v. *Frame*, 885 F.2d 1119, 1135 (1989), relied on by the Nebraska Cattlemen (at 44), the Third Circuit's detailed inquiry into the Act's legislative history produced no such evidence; the court merely concluded that Congress was "presumably" trying to prevent free riders, but cited as evidence only the fact that a proposal for a voluntary assessment program received no support. The only other evidence of any such problem cited by petitioners is the testimony of one Beef Board adviser in this litigation, fifteen years after the Act was passed, hypothesizing that a voluntary program would not have worked. See Nebraska Cattlemen Br. 44 (citing J.A. 168-69). The *Lehnert* case is thus wholly inapposite: There, the free rider problem had been the most serious and well-documented obstacle to union organizing before the emergence of union shops and agency fee arrangements; the unions lobbied heavily about it; and Congress, having studied it extensively, was plainly concerned with eliminating it. See *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 761-64 & nn.13-14 (1961).

Here, even analyzed *ex post*, this rationale lacks any factual basis: there is no evidence that a beef promotion program relying on voluntary contributions—or at least permitting objectors to obtain refunds for fees unconstitutionally expended on speech—would not have been successful, as none has ever been tried. See Nebraska Cattlemen Br. 9-10 (explaining that

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[30] The government cites Congress's findings on commodity promotion generally in 7 U.S.C. 7401. U.S. Br. 17-18. These were passed in 1996, a decade after the Beef Act; include no findings specific to the beef industry; and are vague and conclusory. Moreover, they do not even describe the same collective action problem that petitioners assert exists—they say nothing about producers' disincentives to support voluntary commodity promotion programs, but simply note that, in the absence of *any* commodity promotion program, individual producers often lack the means or incentive to advertise. See 7 U.S.C. 7401(b)(7); *id.* § 7401(b)(10).

predecessor program, which would have allowed objectors to obtain refunds, never went into effect).[31] Unions have, after all, not been incapacitated from speaking by the requirement that they not compel objectors to support their speech unless it is germane to collective bargaining.

Second, the very notion of a free rider problem is question-begging in this First Amendment context, because those who refuse to support a message with which they *disagree* cannot in any meaningful sense be said to be "free riding" on that message. Indeed, a particularly troublesome assumption of the government's argument is that beef producers *cannot* legitimately disagree with the message of the Beef Act promotions. See, *e.g.*, U.S. Br. 38 ("Beef Act speech * * * involves the promotion of the very product that the persons assessed have chosen to produce and sell."). That assumption is surely wrong. Respondents *do* disagree with the message that foreign grass-fed beef is equivalent to American grain-fed beef. Other beef producers might well have other objections. Farms that pride themselves on raising beef in a humane manner might well oppose encouragement of a general increase in beef consumption on animal rights grounds. Cf. *Amicus* Br. of Rose Acre Farms 1-2 (Statement of Interest). Similarly, family farmers might oppose the checkoff on the ground that it primarily benefits centralized agribusiness. See *Amicus* Br. of Campaign for Family Farms 3-6. These producers are *dissenters*, not free riders.[32]

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[31] Nebraska Cattlemen assert (at 44) that the failure of the referenda on the voluntary program proves the collective action problem existed, but in fact the opposite is true: if beef producers really acted as selfish free riders, they would have voted *for* the voluntary program, and then not participated in it. It is not indicative of an intent to free-ride that producers voted not to give themselves the opportunity to do so.

[32] Even if it can be reasonably assumed that a commodity's producers in a *collectivized* industry without niche markets support ads promoting that commodity, the same assumption simply cannot

This Court has never held that compelled support of speech can be justified constitutionally simply on the basis that objectors might otherwise take a "free ride" *on the speech itself*. In its agency fee cases, the Court's concern has instead been that employees might free-ride *on the union's performance of its collective bargaining duties*, to which speech of a certain sort is germane. When speech is not "oriented toward the ratification or implementation of petitioners' collective-bargaining agreement," the Court has rejected free rider arguments even when the speech likely "benefited" the objectors. See, *e.g.*, *Lehnert*, 500 U.S. at 527. This Court has never second-guessed people's statements regarding the views they do and do not support; it should not do so now.

Finally, and fatally, the Beef Act is not narrowly tailored to solving a supposed "free rider" problem, for there is an obvious, less restrictive alternative that would have solved any such problem completely: Congress could have funded the beef promotions through general revenue. This solution should have been especially obvious because Congress had in fact already considered it before enacting the initial Beef Research and Information Act in 1976. See *Frame*, 885 F.2d at 1135; *Western States Med. Ctr.*, 535 U.S. at 371 ("[Under *Central Hudson*,] if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").[33]

2. Taxpayer Backlash. The government's main objection to the obvious alternative of funding the program through general revenue is its theory that such expenditures might "undermin[e] the very support for the beef industry that [the Beef Act] sought to engender from the public," and—presumably—cause people to retaliate by eating less beef.

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be made in the highly differentiated beef industry. Contra U.S. Br. 39 (citing *Wileman Bros.*, 521 U.S. at 470).

[33] In this context, of course, "less restrictive" translates into "less coercive."

U.S. Br. 41. This "grocery-store-rage" theory has no support in the legislative record and must be rejected as mere *post hoc* speculation. It is also silly. The objective of the Beef Act was not to build goodwill toward the beef industry, but to convince people that they want to have beef for dinner. The two goals are quite different. Even if a tax-funded program would have been unpopular, there is no earthly reason to assume that disgruntled taxpayers would blame the program on the *beef industry* rather than on Congress—and would then change their eating habits as a result rather than, for example, voting their representatives out of office.

The legislative history of the Beef Act and its predecessor *does* reflect numerous statements by legislators praising the fact that the program would cost taxpayers nothing. See, *e.g.*, 121 CONG. REC. 38,114; 121 CONG. REC. 31,439. The concern appears to have been purely fiscal, unconnected to grocery store rage. See H.R. REP. No. 99-271, at 2 (1985). But the government does not even *attempt* to argue that simply saving taxpayers money constitutes a sufficiently "substantial" interest to satisfy *Central Hudson*—and such a rationale would itself compromise central First Amendment values. As we have seen, the expenditure of general tax revenue on government speech serves those values precisely because it puts in place a political check on government's abuse of its power to speak. The government's argument that taxpayers cannot be asked to fund the Beef Act because they might get angry about it amounts to a bold assertion that this program should be shielded from these political safeguards.

Finally, there is an obvious and less burdensome alternative solution to this problem—a program funded by voluntary contributions—to which, given the weakness of the free rider argument, petitioners offer no serious objection.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

Philip Olsson
OLSSON, FRANK & WEEDA, P.C.
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 516-6366

Ronald A. Parsons, Jr.
Scott N. Heidepriem
JOHNSON, HEIDEPRIEM, MINER, MARLOW & JANKLOW, L.L.P.
P.O. Box 1107
Sioux Falls, SD 57101

Laurence H. Tribe
(Counsel of Record)
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138

Thomas Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, NW
Washington, DC 20016

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Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

Congress enacted the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, in order to bring a halt to the deterioration of a major sector of the national economy. Acting on the basis of the widely shared understanding that advertising a product stimulates demand for it, Congress established a program of government-directed advertising of beef products. Because producers of a generic product, like beef, are reluctant to pay for advertising on which others can obtain a free ride, Congress imposed a mandatory assessment on the sale of cattle and beef products to fund the advertising program. That government advertising program has been highly successful in stimulating the sale of beef.

Respondents are direct beneficiaries of the generic advertising that is conducted under the Beef Act. They nonetheless claim a First Amendment right to avoid contributing

financially to that program. The First Amendment, however, does not give them such a right. The Beef Act advertising program is constitutional for two reasons. First, it is justified under the government speech doctrine. Second, it satisfies intermediate scrutiny. Respondents' arguments to the contrary are without merit.

I. *UNITED STATES* V. *UNITED FOODS, INC.*, DID NOT RESOLVE EITHER OF THE QUESTIONS PRESENTED HERE

Respondents contend that *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), "controls this case." Resp. Br. 7. In *United Foods*, however, the Court expressly refrained from deciding whether a similar generic advertising program involved government speech because that issue was not raised or resolved in the court of appeals. 533 U.S. at 416-417. Thus, nothing in *United Foods* addresses, much less controls, the proper resolution of the government speech question presented here.

Similarly, the Court in *United Foods* did not resolve the question whether the advertising program at issue in that case satisfied intermediate scrutiny because the government did not seek to justify the program under that standard. 533 U.S. at 409. Here, the government argues that the Beef Act is valid under intermediate scrutiny, and nothing in *United Foods* has any bearing on the resolution of that question.

II. BEEF ACT ASSESSMENTS ARE CONSTITUTIONAL UNDER THE GOVERNMENT SPEECH DOCTRINE

A. Advertising Under The Beef Act Is Government Speech

Respondents argue that advertising under the Beef Act is not government speech. Resp. Br. 29-34. But Congress has specified the basic pro-beef message to be disseminated; it has created a government entity—the Beef Board—to disseminate that message; and it has entrusted ultimate control of the message to a Cabinet Officer—the Secretary of Ag-

riculture. Those structural elements demonstrate that advertising under the Beef Act is government speech.

1. ***The government exercises control over advertising under the Beef Act***

Respondents argue that Congress has effectively provided no direction on the nature of the advertising disseminated under the Beef Act. Resp. Br. 30. Through its definition of the term "promotion," however, Congress has determined the central message that all advertising under the Beef Act must convey—that it is desirable to eat beef. See 7 U.S.C. 2902(13) (advertising must "advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the market place"). Congress has given the Beef Board and the Secretary considerable discretion to formulate the advertisements that will communicate that basic message. Advertisements may proclaim "Beef: It's What's for Dinner," J.A. 50, or that beef provides "key nutrients," *ibid.*, or that "it's easier than ever to give people the beef they crave." J.A. 51. But Congress itself has dictated the central pro-beef message contained in those advertisements. That element of legislative control is an important factor in establishing that advertising under the Beef Act is government speech.

Congress has also created a governmental entity—the Beef Board—to disseminate its pro-beef message. While respondents contend that the Beef Board is a private entity (Br. 30-31), that contention conflicts with *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). In that case, the Court held that an entity is a governmental entity for First Amendment purposes when (1) it is created by special law, (2) it is designed to achieve governmental purposes, and (3) a majority of the members are appointed by the government. The Beef Board has each of those characteristics, and respondents do not suggest otherwise.

Instead, respondents argue (Br. 33) that the *Lebron* standard applies only to the question whether an entity is con-

strained by the First Amendment, not to the question whether an entity is governmental when it speaks. But *Lebron* categorically held that the existence of the three specified facts means that an entity "is part of the Government *for purposes of the First Amendment*." 513 U.S. at 400 (emphasis added). Respondents offer no logical basis for drawing the distinction they propose or to justify the proliferation of distinct tests for governmental entity status. Respondents make no effort, for example, to explain how Amtrak could be a governmental entity when it restrains speech but not when it promotes rail transportation. Because the Beef Board is a governmental entity under *Lebron*, its role in the dissemination of advertising under the Beef Act reinforces the conclusion that such advertising is government speech.

The Secretary's ultimate control over the content of advertising under the Beef Act confirms that conclusion. Respondents assert (Br. 30) that the Secretary only "loosely oversees compliance with the statute's conditions." But the Beef Board's budget and all plans, projects, and contracts of the Operating Committee for promotion and research must be affirmatively approved by the Secretary. 7 U.S.C. 2904(4)(C), 2904(6)(A) and (B). In addition, USDA requires the Beef Board to submit all advertising and promotional material funded under the program for approval. J.A. 114, 143, 274-275; see Agricultural Mktg. Serv., USDA, *Guidelines for AMS Oversight of Commodity Research And Promotion Programs* 7 (1994); 7 C.F.R. 1260.150(o) (requiring the Board to "submit to the Secretary such information pursuant to this subpart as may be requested). And USDA has rejected messages that facially meet the statute's conditions. J.A. 118-121, 261, 272. Moreover, in practice, USDA officials work closely with the Beef Board and Operating Committee on the development of particular projects from their inception so that formal disapproval of a project is rarely required. J.A. 111-114, 274.

Respondents cite no evidence to support their unsubstantiated assertion that the Secretary exercises only ministerial review. Congress's vesting of that responsibility in the Secretary is inconsistent with the mere ministerial label. To the contrary, it ensures that the government will be politically accountable for a particular act, here the advertising that is disseminated under the Act.[1]

2. *The district court's government speech determination is not entitled to deference*

Respondents assert that the court of appeals affirmed the district court's determination that advertising under the Beef Act is privately controlled and that the district court's determination is therefore entitled to deference under the two-court rule. Resp. Br. 30. The court of appeals, however, did not affirm the district court's determination. Instead, it held that the government speech doctrine insulates the government only from a First Amendment challenge based upon the government's choice of content, not from a challenge to a requirement to contribute to the funding of government speech. Pet. App. 16a-17a. The two-court rule is therefore inapplicable.

Furthermore, the question whether the government exercises sufficient control of the content of speech to make it government speech is not a question of historical fact. The Secretary is vested with responsibility for and control over the Beef Act program *by law*, and the Act and implementing

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[1] The activities of state beef councils and the National Cattlemen's Beef Association (NCBA) do not detract from the conclusion that advertising under the Beef Act is government speech. See Resp. Br. 31. The Beef Act does not require producers to fund advertising conducted by state councils. Instead, it permits producers who contribute to state programs to obtain a credit for that contribution. 7 U.S.C. 2904(8)(C). The Act also does not require producers to contribute funding to the NCBA. The NCBA has contracts with the Beef Board to develop advertising campaigns. As *Rust* v. *Sullivan*, 500 U.S. 173 (1991), makes clear, the government is free to use such private entities to help develop and disseminate its message.

regulations and guidelines require USDA officials to take certain official actions. When the responsible USDA officials take those actions, the courts must accord them a presumption of regularity and regard them as based on due consideration. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *Franklin* v. *Massachusetts*, 505 U.S. 788, 824-825 (1992) (Scalia, J., concurring).

In any event, to the extent factual issues are relevant, the question of the nature of the government's control and approval is at most a mixed question of law and fact. This Court exercises de novo review over mixed questions when the applicable legal standard can only be given meaning through its application to particular circumstances. *Ornelas* v. *United States*, 517 U.S. 690, 696-697 (1996); *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). That is the situation here. The only way for the Court to provide guidance on when a program involves government speech is to assess that issue independently.

In addition, this Court has generally refused to give deference to district court determinations on whether First Amendment standards have been satisfied. Instead, it has conducted an independent examination of the record, without deference to the district court. *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995). There is no reason to follow a different approach here.

Moreover, district court determinations do not warrant deference when they are infected with legal error, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984), and the district court's determination that advertising under the Beef Act is not government speech suffers from that infirmity. In particular, the district court erred as a matter of law when it failed to give weight to Congress's specification of the basic message, Pet. App. 54a-55a, when it failed to apply *Lebron* in determining the status of the Beef Board, *id.* at 53a, and when it failed to give weight

to the Secretary's legal responsibility for approving advertising that is disseminated under the Beef Act, *id.* at 55a.

Finally, the district court's determination is based on subsidiary determinations that are wholly unsupported by the record. For example, the district court based its determination that the Secretary exercises only ministerial review on a USDA officials's purported admission. Pet. App. 55a. That official, however, made no such admission. See U.S. Br. 35 n.7. And the evidence establishes the extensive nature of USDA's involvement in the development and dissemination of advertising under the Beef Act. J.A. 111-116, 268-277, 303-304. Similarly, the district court's determination that the Secretary engages in "pro forma" approval of Beef Board members is baseless. See Pet. App. 55a. The Secretary appoints Board members after receiving at least two nominations for each position. J.A. 116, 267. And before a final selection is made, applications of the nominees are reviewed and background checks are conducted. J.A. 150, 267. The Court should not defer to district court determinations that are wholly unsupported by the record.[2]

3. *Beef Act advertising is government speech under* Rust *v.* Sullivan

Respondents' position that advertising under the Beef Act is not government speech cannot be reconciled with *Rust* v.

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[2] Respondents make other assertions that are equally unsupported by the record. Contrary to respondents' assertion (Br. 31), the Beef Board controls the disbursement of funds to the NCBA. J.A. 234, 259, 278. Similarly, respondents mistakenly claim (Br. 5) that USDA plays no role in the Beef Board's planning cycle. USDA officials attend every meeting at which the budget is discussed; those officials then advise the Secretary, and the Secretary must approve every budget. J.A. 111-113; 7 U.S.C. 2904(4)(C). Respondents' assertion (Br. 5) that implementation of projects begins before the Secretary's approval is not supported by their citations to the record. The record shows that contracts are not effective until they are approved by the Secretary, 7 U.S.C. 2904(6)(A), and contractors receive payments only after incurring costs pursuant to a contract approved by the Secretary. J.A. 234. Finally, as discussed above, the Secretary does not approve Board members in "slate fashion." Resp. Br. 4.

Sullivan, 500 U.S. 173 (1991). There, a statute and agency regulations provided for the furnishing of federal funds to private organizations that employed doctors to counsel patients on a variety of family planning topics, but prohibited them from using those funds to counsel patients on abortion as a method of family planning. The Court rejected a First Amendment challenge to that limitation. The Court has subsequently explained *Rust* as a case that involved government speech for purposes of First Amendment analysis because Congress used the private doctors to communicate a governmental message—*i.e.* to transmit information about, or pursuant to, a governmental program. See *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001).

In the Beef Act, as in *Rust*, Congress has specified the basic message that it wants communicated and has given others discretion to decide how to communicate that basic message. Unlike in *Rust*, however, Congress has established a government entity to disseminate the message and has entrusted a politically accountable Cabinet Officer with ultimate responsibility over the content of the message. The conclusion that advertising under the Beef Act is government speech therefore follows *a fortiori* from *Rust*.

Respondents seek to distinguish *Rust* on the ground that the program at issue in that case involved the use of general tax revenues. Resp. Br. 24. But the decision in *Rust* did not turn on that fact. Rather, *Rust* stands for the proposition that "funds raised by the government" may be used to support the government's "own policies." *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000). And those funds may be raised by "taxes or *other exactions* binding on protesting parties." *Id.* at 229 (emphasis added). The principle established in *Rust* is therefore controlling here.

4. Keller *v.* State Bar *is inapposite*

Respondents argue that *Keller* v. *State Bar*, 496 U.S. 1 (1990), demonstrates that government control of the message is not the overriding factor in deciding whether a pro-

gram involves government speech. Resp. Br. 32-33. *Keller*, however, does not support respondents' position.

In *Keller*, the Court held that the California State Bar, which participated in an advisory capacity in regulation of the legal profession, was not engaged in government speech when it expressed opinions on issues such as gun control and a nuclear freeze initiative. Respondents' reliance on *Keller* is misplaced because the government did not control the views on those issues expressed by the Bar. Instead, the Bar operated essentially like an autonomous private organization (albeit one in which membership and the payment of dues were mandatory) when it engaged in the expressive activity to which the plaintiffs objected. See 496 U.S. at 5-6 & n.2, 12, 15-16.

Indeed, *Keller* did not involve *any* of the elements of government control that make advertising under the Beef Act government speech. The legislature did not specify that the State Bar should favor gun control or a nuclear freeze. The State Bar was not a governmental entity under *Lebron* because the government did not appoint a majority of the members to the Bar's governing body (see *Keller* v. *State Bar*, 255 Cal. Rptr. 542, 546-547 (1989)).[3] And a politically accountable state official in a traditional state agency did not approve the Bar's positions before they were disseminated. The *Keller* Court's holding that the State Bar was not engaged in government speech is therefore hardly surprising, and it does not remotely suggest that advertising under the Beef Act is not government speech.

Respondents are similarly incorrect in arguing that *Keller* shows that *Lebron* applies only to the question whether an entity is subject to First Amendment constraints, not to the question whether an entity is engaged in government

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[3] Although the California Supreme Court found the State Bar to be a "government agency" for state law purposes, the Court held that the Bar's status under state law was not dispositive of the question whether its speech fell within the government speech doctrine for First Amendment purposes. 496 U.S. at 11.

speech, and that the Beef Board is therefore not a governmental entity for purposes of the government speech doctrine. Resp. Br. 33. As discussed above, the State Bar in *Keller* was not a governmental entity under *Lebron*'s three-factor test. Accordingly, *Keller* did not present the question whether an entity that satisfies that test is part of the government for First Amendment purposes when it speaks.

As respondents note (Br. 33-34), a state bar is subject to First Amendment constraints when it performs certain activities. But that is not because it is always a governmental entity when it restrains speech and always a private entity when it speaks, as respondents suggest. Instead, it is because a state bar is ordinarily a private entity, and a private entity engages in state action when state law affirmatively influences or coerces the challenged action, but not otherwise. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 547 (1987); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982). Thus, in *Baird* v. *State Bar*, 401 U.S. 1 (1971), a decision upon which respondents rely, a state bar's action was subject to First Amendment challenge because the state bar had implemented a rule of the State's highest court. As *Lebron* explains, that state action analysis has no application to the very different question whether an entity is itself part of the government. 513 U.S. at 378. *Lebron*'s three-part test governs that inquiry, and an entity that satisfies that test "is part of the Government for purposes of the First Amendment." *Id.* at 400. Thus, the Beef Board is a governmental entity for purposes of the government speech doctrine, and nothing in *Keller* suggests otherwise.

B. Under The Government Speech Doctrine, The Government May Support A Program Of Government Speech Through Targeted Assessments

1. *The Court's compelled speech cases are inapplicable*

Respondents contend (Br. 34) that, regardless of whether advertising under the Beef Act is government speech, assessments under the Act run afoul of this Court's compelled speech cases—*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In *Barnette*, the Court held that a State could not require public school students to recite the pledge of allegiance and salute the flag. In *Wooley*, the Court held that a State could not require a motorist to display a state motto on his license plate. The Beef Act does not require beef producers to repeat an objectionable message out of their own mouths. Nor does it require them to use their own property to convey a government message. Instead, it requires only that they make a financial contribution to an advertising program that is designed to benefit the industry in which they have voluntarily chosen to participate and to promote transactions in the products they have chosen to sell. *Barnette* and *Wooley* are therefore inapposite here.

Glickman v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997), is dispositive on that point. There, the Court squarely held that *Barnette* and *Wooley* are "clearly inapplicable" to programs that compel funding for generic advertising. *Ibid.*

2. *The Court's compelled funding cases do not limit the government's authority to fund its own speech*

Respondents' reliance (Br. 14-15, 22-23, 34) on *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), is equally misplaced. In that case, the Court held that public employees have a First Amendment right to refrain from fund-

ing a union's ideological speech unless that speech is germane to the union's collective bargaining activities. The Court has applied that compelled funding principle in other contexts in which the government requires an individual to provide financial support for private speech to which the individual objects. *Keller*, *supra* (activities of a state bar); *Southworth*, *supra* (university's student activity program). The Court has never suggested, however, that *Abood*'s compelled funding principle limits the authority of the government to impose assessments to support the government's own speech. To the contrary, the Court has made clear that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." *Southworth*, 529 U.S. at 229.

Extending the *Abood* principle to assessments that are used to fund government speech would eviscerate the government speech doctrine. It would mean that taxpayers would have a First Amendment right to refrain from paying taxes to support government policies to which they object. It would mean that students in a public university would have a First Amendment right to refrain from paying tuition to support particular university course offerings to which they object. And it would mean that consumers and cigarette manufacturers would have a First Amendment right to refrain from paying a tax on cigarettes when the revenue from the tax is used to promote the State's message that smoking is unhealthy.

The First Amendment does not require those extraordinary results. To the contrary, the Court has stated that taxpayers have no right to protest the payment of taxes to support government policies to which they object. *Keller*, 496 U.S. at 12-13. Similarly, the Court has expressly indicated that a university may charge tuition to students for course offerings to which the students object. *Southworth*, 529 U.S. at 229. And the Ninth Circuit has recently held—and respondents concede (Br. 37-39)—that a State may impose a tax on wholesale cigarette sales to fund the State's

anti-smoking campaign. *R.J. Reynolds Tobacco Co.* v. *Shewry*, 384 F.3d 1126 (2004). Indeed, it is hard to imagine that the First Amendment would allow a tax on beef to fund government speech explaining the health concerns with excessive beef consumption, but preclude an assessment to fund government speech promoting beef consumption.

Assessments under the Beef Act share characteristics of both the assessment of tuition on students and the tax on the sale of cigarettes. Like the assessment of tuition on students, assessments under the Beef Act are imposed on those who most directly benefit from the government's program. And like the cigarette tax, the Beef Act assessment is imposed on the sale of a product. The constitutionality of those assessments therefore supports the constitutionality of assessments under the Beef Act.

3. *Respondents' attribution theory is unsound*

Respondents understandably shrink from the consequences of literally applying *Abood*'s compelled funding principle to government speech. Instead, they seek to limit the application of *Abood*'s compelled funding principle in the government speech context to situations where the public is likely to attribute the government's message to persons who have funded the program. Resp. Br. 18-21. Applying that limitation, respondents contend that taxes on the general public, requiring students to pay tuition for course offerings to which they object, and a tax on the sale of cigarettes to support an anti-smoking campaign do not violate the First Amendment, *id.* at 23, 38, 41, while assessments under the Beef Act run afoul of the First Amendment. For several reasons, respondents' attribution limitation does not withstand analysis.

First, respondents asserted their alleged attribution injury for the first time in their brief on the merits in this Court. Respondents did not allege that they suffered attribution injury in their complaint; they did not assert that injury in their affidavits; and they did not testify that they suffered attribution injury at trial. The only injury they

asserted is that they were required to fund an advertising message with which they disagreed. See Pet. App. 35a-37a.

Second, respondents' attribution theory is really just a repackaging of their flawed claim that the advertising is not *government* speech. If, as demonstrated *supra*, the advertising here is understood as government speech under the Court's most apposite precedents, there is no reason to conclude that the speech will be mistakenly attributed to private persons who are required to pay assessments used by the government to fund the speech.

Third, respondents' attribution limitation is not grounded in *Abood*. The injury suffered by the individuals in *Abood* was that they were compelled to provide financial support for union positions to which they objected. Nothing in *Abood* suggests that the objecting employees were injured because the public mistakenly attributed the union's positions to them. Nor is such an argument plausible. Members of the public with a basic understanding of how a union formulates its positions would not attribute those positions to every person who pays union dues. Similarly, the injury suffered by the individuals in *Keller* was that they were compelled to provide financial support for positions of the state bar to which they objected. No reasonable member of the public would have concluded that every attorney who pays dues to the state bar supports all the bar's public positions. *Abood* and the decisions applying it therefore do not support respondents' attribution theory. Not surprisingly, respondents do not cite either *Abood* or *Keller* as support for their attribution theory.

Fourth, while attribution concerns have played an important role in some of the Court's cases, none of those cases involved mandatory funding. Instead, attribution concerns have arisen when the government has required a private entity to include another person's message in its own communication, see *Hurley*, *supra*; *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994), or when the government has required a private entity to permit other persons to use its

property for expressive purposes, see *Pruneyard Shopping Ctr.* v. *Robbins*, 447 U.S. 74 (1980). The Beef Act does not require Beef producers to include in their own communications, or display on their own property, messages of other private parties. The Court's attribution cases therefore have no application here.

Finally, to the extent that attribution analysis should play any role in compelled funding cases such as this one, the inquiry should be no more exacting than in an analogous line of cases—Establishment Clause cases where a taxpayer claims that the public would perceive the funding of a particular activity as an endorsement of religion. Indeed, respondents have acknowledged that the Establishment Clause provides the most vibrant protection against compelled funding. Resp. Br. 11. In the Establishment Clause context, the Court asks whether a reasonable observer familiar with the history and context of the program would conclude that the government is endorsing religion. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002). The analogous inquiry here would be whether the reasonable observer familiar with the history and context of the Beef Act would mistakenly attribute the messages contained in advertising under the Beef Act to each individual beef producer who pays a mandatory assessment that is then used to fund the advertising.

The reasonable observer would not engage in such mistaken attribution. That observer would know that Congress specified the basic message; that it created a governmental entity (the Beef Board) to disseminate the message; that it entrusted the Secretary of Agriculture with the responsibility for and control over the program; that it *required* beef producers to contribute funding to pay for the message; and that the advertisements carry the distinctive logo of the Beef Board. No reasonable observer familiar with those circumstances would mistakenly attribute the messages in the advertisements to individual producers simply because the

producers paid *mandatory* assessments that, subject to government approval, were used to pay for the advertisements.

Some advertisements contain the statement that they are paid for by the producers. J.A. 52. But that statement is entirely truthful and simply identifies the underlying source of funding. Even taken in isolation, it does not suggest that each producer of beef supports the messages contained in advertising under the Beef Act. See Resp. Br. 18. More fundamentally, however, no reasonable observer in possession of *all* the relevant facts could reach that conclusion.[4]

4. *Respondents' rights-benefit distinction is inconsistent with basic First Amendment principles*

Respondents also seek to cabin the application of the *Abood* principle based on a rights-benefits distinction. Respondents specifically contend that there is a constitutional distinction between a program that requires funding as a condition for obtaining a government benefit and a program that requires funding as a condition of pursuing a chosen livelihood. Resp. Br. 22, 40-41. Based on that distinction, respondents argue that it is permissible for a public university to condition a student's admission on the payment of tuition that supports course offerings to which the student objects, while the funding obligation at issue here is unconstitutional. *Id.* at 40-41.

Respondents' rights-benefits distinction conflicts with this Court's First Amendment cases. Indeed, in *Abood* itself, the State imposed an obligation on employees to fund union activities as a condition of obtaining a government benefit—public employment. *Abood* is consistent with numerous decisions that have rejected any rights-benefits distinction in the

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[4] In any event, the proper remedy for respondents' alleged attribution injury would be an order enjoining the Secretary and the Beef Board from attributing to them the messages contained in advertising under the Beef Act. The existence of that injury could not justify an order enjoining the collection of all assessments under the program.

First Amendment context. See, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 403-404 (1963). Respondents seek to resurrect the very distinction that this Court long ago rejected.

Moreover, respondents' proposed distinction is not supported by practical considerations either. A student who can only afford to attend the local public university can take very little comfort from the university's statement that he is free to attend another school elsewhere. At the same time, a participant in the beef industry can absorb the modest assessment at issue here as part of the cost of doing business, particularly when the assessment is imposed on all his competitors and the advertising is likely to generate additional revenue for that producer whether or not he personally endorses the nature or content of particular advertisements. Respondents' proposed rights-benefits distinction therefore has nothing to commend it.

5. *The Beef Act is subject to democratic checks*

Respondents argue that the Beef Act does not contain sufficient democratic checks to justify application of the government speech doctrine. Resp. Br. 27. The ordinary democratic checks on government speech, however, are also available here. The promotional program under the Beef Act is under the control of a politically accountable official, the Secretary of Agriculture. Congress also has agency oversight responsibility, and all persons, including respondents, may seek a legislative change. Moreover, as producers, respondents have an additional avenue for seeking change. Under the Beef Act, when at least 10% of the beef producers wish to hold a referendum on the continuation of the program, they may ask the Secretary to conduct such a referendum. 7 U.S.C. 2906(b). Those democratic checks are more than sufficient to support application of the government speech doctrine.

Respondents err in asserting (Br. 27 n.16) that the referendum process is ineffective. While respondents claim that they gathered the number of signatures necessary to

trigger a referendum, the Secretary reached a different conclusion. That disagreement provides no basis for respondents' claim that the referendum process is ineffective. Similarly, respondents mistakenly assert (*ibid.*) that the Secretary improperly failed to hold a referendum on the continuation of the pork program. In fact, the Secretary terminated the pork checkoff program after an advisory referendum. Supporters of the program, however, filed a legal action challenging both the counting of the votes and the legal basis for terminating the program. *Michigan Pork Producers Ass'n* v. *Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001). Ultimately, the Secretary settled that case by agreeing not to terminate the program, and that agreement was upheld by the district court. *Id.* at 648.

III. THE BEEF ACT SATISFIES INTERMEDIATE SCRUTINY

A. Respondents contend (Br. 43-45) that the Beef Act cannot be justified under the standard of intermediate scrutiny that is applicable to commercial speech. But the Beef Act increases the amount of speech available and does not restrict the right of any individual to add his own speech. Thus, at the very least, it should not be subjected to any greater scrutiny than restrictions on commercial speech. Indeed, six Justices have already concluded that generic advertising programs are constitutional if they satisfy intermediate scrutiny. See *Wileman*, 521 U.S. at 491-504 (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia, J); *United Foods*, 533 U.S. at 429-431 (Breyer, J., dissenting, joined by O'Connor and Ginsburg, JJ.).

B. Respondents' contention (Br. 45-50) that the Beef Act does not satisfy intermediate scrutiny is incorrect. Respondents do not question the importance of the government purpose to strengthen an industry important to the national economy. Nor do they dispute that advertising beef will increase demand for that product. Instead, respondents

challenge the government's interest in compelling beef producers to fund the advertising program through assessments on the sale of cattle. *Id.* at 46-49.

That method of funding, however, responds directly to a well established collective action/free rider problem. Although all beef producers benefit from generic advertising promoting beef, no individual producer benefits enough to justify paying for advertising on which other producers would be free riders. That free rider problem is a well recognized phenomenon. Mancur Olson, *The Logic of Collective Action* 43-48 (1971); see Brief of Cal. Agricultural Issues Forum as Amicus Curiae 18-23. And the evidence in this case confirms the existence of that problem. J.A. 168. Respondents are incorrect in asserting (Br. 46-47) that the interest in avoiding a collective action/free rider problem is a *post hoc* rationalization. Congress was well aware that, for the program to work, assessments would have to be mandatory rather than voluntary. See 131 Cong. Rec. 33,029 (1985) (statement of Sen. DeConcini) ("Only a united industry, supported by all producers, can survive in these challenging times."); *ibid.* ("Under this system all producers benefit, and it is only fair that all producers should share the cost.").

C. Respondents argue that Congress was required to achieve its objective through the "less restrictive alternative" of a tax on the general public. Resp. Br. 49. But intermediate scrutiny does not require Congress to adopt the least restrictive means. All that is required is "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (internal quotation marks omitted). That standard is satisfied here because beef producers pay assessments in direct proportion to their sales of beef, and therefore in direct proportion to the degree to which Congress could reasonably conclude that they benefit from advertising and promotion under the Beef Act.

Moreover, it is not obvious why a more widely imposed tax is less restrictive in any sense relevant to the First Amendment. If a government program addresses a legitimate problem, like the collective action/free rider problem, it not clear why the funding mechanism for that program should be critical. Certainly nothing in the First Amendment should preclude congressional efforts to match the benefits of a program with a stream of revenues.

Finally, Congress had substantial reasons for preferring a targeted assessment to a tax on the general public. Congress could reasonably decide that it was more equitable to impose the costs of the Beef Act on those who would most directly benefit. Congress's approach also helped to ensure the support and participation of an industry that was reluctant to take public handouts. *United States* v. *Frame*, 885 F.2d 1119, 1135 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). And Congress's approach avoided the risk that a tax on the general public would reduce the public support that was necessary for the success of the program.[5]

* * * * *

For the foregoing reasons, as well as those set forth in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

NOVEMBER 2004

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[5] Respondents contend (Br. 20) that the Beef Act not only violates their First Amendment right to free speech, but also their First Amendment right to free association. That claim, however, is based on the same basic theory as their free speech claim—that the government may not compel individuals to provide financial support for speech to which they object. Respondents' free association claim therefore adds nothing to their free speech claim and fails for the same reasons. The Beef Act is constitutional both because it is justified under the government speech doctrine and because it satisfies intermediate scrutiny.

(29) (26)

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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS NEBRASKA CATTLEMEN, INC., GARY SHARP, AND RALPH JONES

GREGORY G. GARRE
LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION

Lost in respondents' First Amendment challenge to the Beef Act is a real world appreciation both for the importance of the federal program that they urge this Court to terminate and the attenuated nature of the alleged constitutional injury on which their entire case rests. Reading respondents' brief, one might surmise that the checkoff program represents a rash federal experiment thrust upon an industry up in arms. Little could be further from reality. The beef industry is the largest sector of the American agricultural economy—accounting for nearly $40 billion in annual revenues from the sale of cattle alone and an important source of U.S. exports. NCI Br. 5-6. Symbolically, moreover, the beef industry—and, in particular, the ranching way of life—has helped to forge our national identity. *Id.* at 5-8. The Beef Act was not enacted on a whim, but in response to a decades-long depression in the beef industry, and only after Congress's prior efforts to alleviate that industry crisis had failed. *Id.* at 8-13.

In addressing that crisis, Congress found that the welfare of the beef industry is "vital" to "the general economy." 7 U.S.C. § 2901(a)(4). It determined that it is in the "public interest" to "carry[] out a coordinated program of promotion and research" as to beef. *Id.* § 2901(b). It declared that the message of that program should be that all beef is "a valuable part of human diet" and "desirabl[e]." *Id.* §§ 2901(b), 2902(13). It charged the Secretary of Agriculture and special administrative bodies with administering all promotional activities implementing that message. *See* NCI Br. 10-11. And it made the common-sense decision to fund the government's generic pro-beef message through "assessments on all cattle sold in the United States." 7 U.S.C. § 2901(b).

It does not take a trained economist to appreciate that the ability to run TV, radio, and print ads promoting beef on a national scale—during the Super Bowl, no less—is a powerful way to stimulate demand. In an industry of thousands of

individual producers of a product, like the beef that comes from cattle, that is difficult to differentiate, collective action is necessary to wage that kind of campaign. With respect to some commodities, like cola, private market forces typically are sufficient to create the incentives necessary to conduct—and pay for—such promotional activities. Congress has determined that collective action—and funding—is required to achieve that result in the case of beef, and that neither the beef industry nor the general economy could afford to allow the U.S. beef market to continue to languish under the prior regime that left the thousands of individual cattle producers to their own devices and budgets in promoting beef.

The checkoff program has achieved great success during the nearly 20 years that it has been in effect, it has left no known (much less, in this case, evidentiary) record of curtailing speech of any kind, and it retains the widespread support of the Nation's beef producers. See NCI Br. 13-16. In a day when the discovery of a single BSE-infected cow can have a grave—and, through the marvels of modern technology, virtually instant—impact on the beef industry, the ability to promote beef and educate consumers about its safety on a national scale arguably has never been more important. This Court should reject the efforts of the small minority of producers who now seek to invalidate that program under the First Amendment on the ground that they object to the content of the government's message that "*all* beef is good."

In neither a literal nor a practical sense does the Beef Act abridge the freedom of speech. To the contrary, the Act *adds* the government's own speech to the marketplace—in the form of a message that was prescribed by an Act of Congress and is carefully implemented by special administrative bodies established by Congress and controlled by the Secretary of Agriculture. The Act does not prevent respondents from criticizing the government's message, adding to it, or saying anything else that they wish. Nor does the Act compel respondents to speak on any subject—or in any way.

The Act does impose a $1 assessment on the sale of cattle in the U.S. to fund the government's promotional activities and other efforts to stimulate beef sales. But that neither transforms the nature of the speech at issue from government speech to private speech nor abridges the speech of producers who pay that dollar. Indeed, respondents acknowledge (Br. 11) that the government could require the "public as a whole" to pay for the generic advertising of beef. It is no less constitutional for Congress to adopt a targeted scheme that is calibrated not only to the individuals who are most likely to *benefit* from the government's pro-beef message, but those who are most likely to *agree* with it, *i.e.*, those who choose to enter the profession of producing beef. The tailored nature of the assessments is a constitutional virtue, not vice.

In this Court, respondents' central complaint (Br. 10) is that requiring cattle producers to pay the assessments is unconstitutional on the ground that the government's speech is "likely to be attributed by the public to the beef producers rather than to the government." That attribution claim is unsubstantiated by respondents' own testimony. It flunks the test that this Court uses to evaluate attribution claims in a closely related First Amendment context, which assumes that the public is aware of the history and context of the government program at issue. And, as a doctrinal matter, it is "so unlimited in principle as to threaten a wide range of legitimate government activity," *R.J. Reynolds Tobacco Co.* v. *Shewry*, 384 F.3d 1126, 1129 (9th Cir. 2004), including exactions on commodities like cigarettes to pay for government speech in the form of public health ad campaigns.

Respondents are free to lobby their fellow beef producers to join in a referendum terminating or suspending the checkoff program; they can lobby Congress to change its generic pro-beef message to authorize ads touting *U.S.* beef (an action that could have serious trade repercussions for a key U.S. export, *i.e.*, beef); and they can run all the individualized ads about beef that they would like *in addition to* the gov-

ernment's generic pro-beef ads. But the First Amendment does not give them a "heckler's veto" over the government's generic pro-beef speech under the Beef Act or its embodiment in an ad like "Beef. It's What's for Dinner."[1]

ARGUMENT

I. THE BEEF ACT IS CONSTITUTIONAL UNDER THE GOVERNMENT SPEECH DOCTRINE.

A. The Speech Conveyed Pursuant To The Beef Act Is The Government's Own.

Generic advertising conducted pursuant to the Beef Act bears all the hallmarks of government speech. *See* NCI Br. 24-33. The message conveyed by that advertising—that *all* beef is good—is Congress's own. 7 U.S.C. §§ 2901(a)(1), (b), 2902(13). And it is disseminated by special administrative bodies—the Board and the Committee—that were created by Congress for the *sole* purpose of implementing the Beef Act and that remain subject to the daily supervision and control of the Secretary of Agriculture. The government's

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[1] Respondents argue that the Beef Act violates their associational rights, but the *only* claim on which the District Court entered judgment is respondents' free speech claim. *See* J.A. 34; Pet. App. 60a. In their complaint, respondents alleged that the Beef Act impermissibly compels them to associate with the National Cattlemen's Beef Association ("NCBA"). *See* J.A. 38. That claim was not passed upon by the courts below, was not developed in respondents' brief in opposition, and thus is not before this Court. In any event, it lacks merit, as respondents even acknowledged at trial. Trial Tr. 141 (Smith). The Beef Act authorizes the Beef Board and Operating Committee to enter into contracts with "established national nonprofit industry-governed organizations," such as NCBA, in implementing the Act. 7 U.S.C. § 2904(6). But the Beef Act in no way compels respondents to associate with such independent contractors, including the NCBA. In addition, NCBA in any event maintains a firewall between its policy and checkoff-related divisions. *See* 8th Cir. J.A. 558-559. More fundamentally, there is no basis for holding that the Beef Act is constitutional under the Speech Clause of the First Amendment, but nonetheless runs afoul of some hypothesized association concern.

speech under the Beef Act is just as immune from First Amendment scrutiny as other government speech.

1. Respondents argue (Br. 30) that the speech conducted under the Beef Act is not government speech because the government's control over the speech is merely "pro forma." As we have explained, the record contains substantial and unrebutted evidence that the Secretary—acting through USDA—exercises extensive oversight and control over all aspects of the checkoff program. *See* NCI Br. 31-33. Respondents chide petitioners for "ask[ing] this Court to ignore its longstanding two-court rule," and argue for "deference" to the lower courts' factual findings. Resp. Br. 17 n. 10, 30. This Court, however, has long recognized that, in the First Amendment context, the Court must "make an *independent* examination of the whole record." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964) (emphasis added). *See also Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (In First Amendment cases, the Court has "a constitutional duty to conduct an independent examination of the record as whole, *without deference to the trial court.*") (emphasis added). Such an examination is particularly warranted where, as here, lower court "findings" are conclusory and unsubstantiated.[2]

Here, the only conclusion that can be drawn from the record is that, "[b]y no means is the government's control over the checkoff-funded program *pro forma*." *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002). Respondents' meager efforts (Br. 30) to demonstrate otherwise are unavailing. The Secretary does not "approve" Board members in "slate fashion." Board members are *appointed* by the Secretary, who receives at least two nominations, sometimes more, for each open seat on the Board. J.A. 116, 266-267; 7 C.F.R. § 1260.143(d). It is also hardly the case that "anything is

[2] Indeed, the Eighth Circuit's "factual findings" on this issue begin and end with a single sentence stating that the Secretary's oversight of the checkoff program is "limited." Pet. App. 24a.

permissible, as long as * * * it will advance the interests of the industry." Resp. Br. 30. USDA will reject any proposed ad that the agency believes does not further the government's interests—and it has rejected ads. *See* J.A. 118, 261, 275.[3] To be sure, USDA does not often disapprove ads, but that is because USDA works closely with the Board and the Committee in "initiat[ing], creat[ing], devis[ing], [and] compos[ing]" the ads every step of the way. Resp. Br. 30. *See* NCI Br. 31-32; U.S. Br. 35. The record establishing that USDA is involved in the activities of the Beef Board "every day," J.A. 268-269, and that the Secretary must approve *every* project or ad, *see* NCI Br. 31, refutes respondents' unfounded suggestion (Br. 30) that USDA only "loosely oversees compliance with the statute's conditions."[4]

2. Respondents argue (Br. 32) that, even if the government controls the message under the Beef Act, *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), demonstrates that the message is still not government speech. *Keller* is the antithesis of this case. In *Keller*, the Court concluded that the state bar was *not* like "a typical government * * * agency" pre-

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[3] Respondent John L. Smith himself testified that USDA "controls the message" of the generic advertising conducted pursuant to the Beef Act. Trial Tr. 141-142. The trial record confirms that fact. *See id.* at 203-204, 215, 230, 270, 279-280.

[4] Contrary to respondents' assertions (Br. 31), the Beef Act does not require producers to fund the speech of qualified State beef councils. The Act merely permits producers who have contributed to programs established by qualified State beef councils to obtain a credit of up to 50 cents for contributions to such programs. *See* 7 U.S.C. § 2904(8)(C). Nor does the Act require producers to fund the NCBA. As explained, like many other organizations, the NCBA has contracted with the Board to develop promotional and research projects and plans. *See* J.A. 135. But that does not make the promotional materials developed by the NCBA the *NCBA*'s speech, or make it any less the *government*'s speech. When the government hires a private firm to develop and implement a promotional campaign, such as the Army's "be all that you can be" ad campaign, the campaign is still the government's own message. *See also* NCI Br. 28-29.

cisely because such control was *lacking*. *Id.* at 12. Here, under *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the entities that Congress made responsible for conveying its message—the Beef Board and the Operating Committee—*are* government entities for First Amendment purposes. *See* NCI Br. 24-27. In *Keller*, there was *no* indication that the state bar officials served, like the Board and Committee, "under the direction and control of * * * governmental appointees." *Lebron*, 513 U.S. at 398. Indeed, unlike here, the speech in *Keller* was not prescribed in the first instance by the legislature, nor was it subject to the final approval of a politically accountable government official.

Respondents fail to offer a persuasive reason why *Lebron*, which involved the issue whether a particular entity "is part of the Government for purposes of the First Amendment," *id.* at 400, is not directly pertinent in considering whether the extent of governmental involvement in the speech at issue makes that speech "government speech." Under respondents' view, the same factors that might be considered in determining whether an entity is part of the government, and thus subject to the constraints of the First Amendment, have no relevance whatsoever in determining whether the entity is part of the government, and thus able to invoke the government speech doctrine when speaking itself. *Lebron*'s consideration of whether an entity "is part of the Government" should not be regarded as such "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

3. Invoking *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), respondents contend that, even if the speech at issue is government speech, it is still subject to First Amendment scrutiny. Resp. Br. 34. But this Court has already held that *Barnette* and *Wooley* and all the Court's "compelled speech case law" is "*clearly inapplicable*" to cases, like this, involving the compelled funding of a generic

advertising program. *Glickman* v. *Wileman Bros. & Elliot, Inc.*, 521 U.S. at 470-471 (emphasis added).[5] Indeed, *Wooley* and *Barnette* only underscore the *absence* of a First Amendment injury here. In *Wooley*, a State "required an individual to participate in the dissemination of an ideological message by displaying it on his private property." 430 U.S. at 713. And in *Barnette*, a State required an individual "to communicate by word and sign his acceptance" of government-dictated political viewpoints. 319 U.S. at 633. *See* NCI Br. 36-37. Here, the government's message that all beef is good is not political or ideological. Nor is anyone compelled to display an "Eat Beef or Die" motto on their personal property or to rise in public and say a "Pledge Of Allegiance To Beef"—indeed, no one is compelled to speak *at all*.

Nowhere is respondents' misplaced reliance on these compelled speech cases more evident than in the conclusions that they draw from them. In respondents' view, this line of cases demonstrates that the First Amendment "protects against the government's ability to compel private citizens to provide affirmative support for the *government's message*," even so far as that means simply "contributing money." Resp. Br. 35 (emphasis added). If respondents were correct, then *every* citizen—including smokers who object to the government's anti-smoking ads, pacifists who object to the government's promotion of the armed services, and atheists who object to the government's faith-based initiatives—would have the right to insist that his or her tax dollars not be used to support programs or policies with which he or she disagreed. That is an untenable proposition, and one which this Court has already rejected. *See Keller*, 496 U.S. at 12-13; NCI Br. 22.

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[5] The Court did not retreat from that holding in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), as amicus Coalition of Cotton Apparel Importers erroneously claims (Br. 5 & n.2). In *United Foods*, the Court stated that "[its] precedents concerning *compelled contributions to speech*," not its precedents concerning *compelled speech*, "provide the beginning point for our analysis." 533 U.S. at 410 (emphases added).

B. Congress Has Permissibly Chosen To Fund The Government's Speech Through Assessments.

Respondents claim (Br. 8) that they "do not challenge the government's ability to speak as it chooses," but rather its ability to compel funding for its speech. The compelled nature of funding itself provides no basis for invalidating a government speech program. *See Keller*, 496 U.S. at 12-13; NCI Br. 21-24. Indeed, respondents acknowledge (Br. 11) that the government could compel the "public as a whole" to pay for the government's pro-beef speech. *See id.* at 23. Moreover, they acknowledge that the government may fund promotional activities through "targeted mandatory assessments" on the sale of *certain* commodities. *Id.* at 37. There is no reason to adopt a different rule in the case of beef.

1. According to respondents (Br. 10-11), because Congress has chosen to fund the Beef Act through assessments on the sale of cattle rather than through "public as a whole," "generic beef promotions are likely to be attributed by the public to the beef producers rather than to the government." This "attribution" theory is now the lynchpin of respondents' constitutional challenge to the Beef Act. *See id.* at 10-11, 18-19. It fails for several different reasons, beginning with the fact that it is unsubstantiated by respondents' own evidence.

None of the affidavits that respondents submitted below—nor, for that matter, their amended complaint (*see* J.A. 34-38)—alleges that the public is likely to "attribute" the generic advertising conducted under the Beef Act to respondents or other beef producers, much less proves that such attribution exists. Instead, in explaining in their own words how they allegedly have been harmed by the generic beef ads, respondents focused on their objection to the "general content" of such promotions, and "the messages conveyed" by the government. J.A. 59 (Thullner); *accord* J.A. 62-63 (Smith), 65-66 (Goggins), 68-69 (Schumacher), 71-72 (Goebel); *see also* J.A. 74-75 (Goggins, on behalf of LMA), 78-79 (Smillie, on behalf of WORC). Similarly, no respondent who

testified at trial alleged any attribution harm. And the only time that the potential for such attribution was discussed, respondents' own witness testified that he did *not* believe that the public would attribute the government's checkoff ads to his organization of beef producers. Trial Tr. 46-47 (Smillie).

It is not surprising that respondents have shifted the theory of their First Amendment injury away from their disagreement with the *content* of the generic beef ads and the government's *message* that all beef is good. It is settled that the government may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). But having failed to allege—much less prove—any attribution injury below, respondents should not be permitted to attack the Beef Act on the basis of such an alleged injury here.

2. As a doctrinal matter, respondents' attribution theory also fails. As this Court has repeatedly recognized, the government has broad authority to decide how to fund its programs. *See Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); *Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940) ("in taxation, even more than other fields, legislatures possess the greatest freedom in classification"); *see also Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 215 (1989) (noting "a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing").

One of the most common—and oldest—forms of taxation is the assessment of excises on particular commodities or industries. *See* The Federalist No. 12 (A. Hamilton) ("[I]n America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises."). Last year alone, the federal government collected over $67 billion in excise taxes. *See* Office of

Management and Budget, *Budget for Fiscal Year 2005, Summary Tables*. This Court has repeatedly rejected challenges to such targeted exactions, including those levied on the *producers* of particular commodities, and not once suggested that they raise special First Amendment "attribution" concerns. *See* NCI Br. 38 n.7 (citing cases); *see also McCray* v. *United States*, 195 U.S. 27, 63 (1904) (excise on artificially colored oleomargarine); *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796) (excise on carriages).

As the Ninth Circuit recently observed, the basic attribution rationale advanced by respondents here is "so unlimited in principle as to threaten a wide range of legitimate government activity." *Shewry*, 384 F.3d at 1129. Under the logic of respondents' theory, individuals could refuse to pay any number of targeted assessments simply by invoking the First Amendment and objecting to the message or content of the activities funded by the assessments. Thus, for example, gasoline producers could refuse to pay excises on the sale of gasoline used to promote clean highways or fuel efficiency by objecting to the program's pro-conservation message. Smokers could refuse to pay excises on the sale of cigarettes on the ground that they disagree with the government's use of those funds to discourage smoking. Indeed, the government might even be prevented from collecting excises to fund *education*, because any number of people might object to particular school curricula. *See Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 & n.14 (1937).[6]

In particular, respondents' attribution theory casts serious doubt on the constitutionality of laws that impose exactions on the sale of cigarettes and alcohol to fund public service

[6] Self-proclaimed pacifists have long objected to the federal excise tax on telephone service because the exaction has funded war costs. *See Darling* v. *United States*, 352 F. Supp. 565 (E.D. Cal. 1972); *Telephone War Tax Resistance* (www.riseup.net/nacc/telephone.htm). Although such objections have failed to date, if accepted, respondents' attribution theory would breathe new life into such challenges, and no doubt many others.

ads designed to reduce the desirability of smoking and alcohol abuse, especially among the Nation's youth.[7] These laws are directly analogous to the program at issue here and the logic of respondents' position leads to the conclusion that they are unconstitutional too. Seeking to avoid that result, respondents offer the bizarre suggestion (Br. 11, 38) that it would be *more* constitutional for the government to collect funds from beef producers for purpose of *disparaging* beef as opposed to *promoting* it. Respondents have it backwards. The fact that the government speech in this case is designed—by Act of Congress—to promote the desirability of the commodity that is subject to the assessments only bolsters the constitutionality of the Beef Act.

Respondents proclaim that "the public would never attribute the government's warnings *to those who pay [cigarette] taxes*, whether producers or users." Resp. Br. 11 (emphasis added). We agree, but not because there is something special about *cigarette* taxes. Rather, the public would never reasonably assume that just because a producer or consumer is required by law to pay an assessment on the sale of a particular commodity, every producer or consumer must endorse the ends to which those funds are used by the government, including when it comes to government speech about the product. Taxes on the sale of commodities have been around since the earliest days of the Republic and the public is well aware that the payment of such assessments does not necessarily connote agreement with the government policy or speech advanced by the funds. It is no different for beef.

Respondents' attribution argument also creates a historical anomaly. Before the adoption of an income tax in the mid-1800s, most of the revenues collected by the fledgling federal government were from excises and imposts on commodities such as whiskey, tobacco, and sugar. Such revenues funded

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[7] *See, e.g.*, Ariz. Rev. Stat. § 36-772; La. Rev. Stat. Ann. § 47:841.1; Me. Rev. Stat. Ann., tit. 22 § 272; Ore. Rev. Stat. § 323.030; *see also* Mont. Code Ann. § 16-1-404.

virtually all of the government's activities—including its speech—in that day. Yet nothing suggests that any of the founders—least of all Alexander Hamilton, the leading proponent of the Nation's first federal excises—believed that the First Amendment imposed any limit on the manner in which the funds collected from such commodity-specific exactions could be used. Indeed, it surely would have come as a shock to the whiskey producers who faced off against the federal troops at the Whiskey Rebellion in the fall of 1794 to learn that instead of raising arms against Washington's army, the producers need only have asserted a First Amendment objection to the payment of the federal assessments on the sale of whiskey on the theory that the public was likely to attribute their payment of such excises as support for the war debts paid off with the funds.[8]

3. None of this Court's government speech cases supports the notion that government speech can be funded only through exactions on the "public as a whole" (Resp. Br. 10). *See id.* at 23. In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the federally-funded nature of the speech at issue made the speech government speech, but the Court never inquired whether the funding came from general tax revenues or some other source. Moreover, there is no indication that the patients who received counseling from the private doctors in *Rust* had any idea that the counseling was funded by federal grants—or that the counseling was the government's message—yet the Court has squarely recognized "that the counseling activities of the doctors * * * amounted to governmental speech." *Legal Services Corp.* v. *Velazquez*, 531

[8] There is no reason to believe that Jefferson—one of the country's most ardent champions of state efforts to promote and sustain an agricultural economy—would have viewed this case any differently. His well-known observation on compelled funding was addressed solely to the colonies' practice on imposing taxes to support *the church*. *See Rosenberger*, 515 U.S. at 869-872 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). We have a specific clause of our Constitution—not remotely implicated here—that prescribes such assessments.

U.S. 533, 541 (2001); *see id.* at 554 (Scalia, J., joined by Rehnquist, C.J., O'Connor, and Thomas, JJ., dissenting).[9]

Similarly, in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), the Court did not "refuse" (Resp. Br. 26) to apply the government speech doctrine because the speech at issue was funded by a targeted assessment in the form of a student activity fee rather than more general exactions imposed on the public as a whole. Rather, the Court did not apply the doctrine because "[t]he University [had] *disclaimed* [the] speech [as] its own," and, therefore, the case simply did not "raise the issue of the government's right * * * to use its own funds to advance a particular message." 529 U.S. at 229 (emphasis added). Moreover, far from establishing that government speech may be funded only through general tax revenues, the Court in *Southworth* specifically acknowledged that, "[t]he government, as a general rule, *may* support valid programs and policies by taxes *or other exactions* binding on protesting parties." *Id.* (emphasis added).

Respondents' reliance on *Keller*—the case respondents describe as "the closest precedent by far," Br. 13—also does not withstand scrutiny. There, the Court focused exclusively on the non-government nature of the entity speaking—the state bar—and not on the purported nexus between the bar's members and the political and ideological speech to which some of them objected. The fact that the bar's funding came "not from appropriations made to it by *the legislature*, but from dues levied on its members by [the bar's] *board of governors*," 496 U.S. at 11 (emphases added), was one factor that led the Court to conclude that the bar was not like a "typical government * * * agency," *id.* at 12, but it was not the *sine qua non*. Significantly, the Court never suggested

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[9] In *Velazquez*, the Court distinguished *Rust* on the ground that the "LSC program was designed to facilitate private speech, not to promote a governmental message." 531 U.S. at 542. The program here is expressly designed to promote Congress's own message.

that, if the bar *were* a government entity, its speech could not be funded through assessments imposed by the State.

4. Respondents' attribution argument also fails on its own terms. In evaluating claims that the "link" between money and an activity gives rise to an unconstitutional perception of attribution or endorsement in a nearby First Amendment context, this Court has applied a "reasonable observer" test. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002). A "reasonable observer" is presumed to be aware of the "history and context" of a challenged government program. *Id.* Respondents' attribution claim would flunk any reasonable-observer test. No one presumed to be familiar with the "history and context" of the checkoff program—including not only the Beef Act, but the industry crisis that led to it—would attribute the message prescribed by Congress and disseminated by the Beef Board to beef producers whose only "link" to the program is the payment of a $1 assessment per head of cattle sold in the United States.

Some (though not all, *see, e.g.*, J.A. 53) of the Beef Board's ads state that they are "funded by America's beef producers." But that does not alter the First Amendment analysis in this case either.[10] The ads do not state that they are the *message* of America's beef producers, just that they are *funded* by them. And they are. At the same time, anyone who notices the statement that the ads are "funded by America's beef producers" also would presumably see the well-known checkoff program logo that appears on most ads—the red ✓ mark with "Beef" appearing at the top (*see* www.ams.usda.gov/lsg/mpb/beef/beefchk.htm#History; www.beefboard.org/dsp/dsp_locationContent.cfm?locationId=1055; J.A.

[10] Nor, in any event, does the notation provide a basis for invalidating the Beef Act itself. Nothing in the Beef Act (or the Beef Order) requires generic ads disseminated under the Act to state that they are "funded by America's beef producers." At most, therefore, such a designation could be challenged in an APA action challenging the Secretary of Agriculture's approval of the ad.

51). The distinctive checkoff logo is a direct sign that the ads are disseminated pursuant to the federal checkoff program—and therefore represent the *government*'s pro-beef message and speech. Conversely, producers who disseminate their own ads to promote their beef products may not use the checkoff logo, and instead use their own marks, such as "certified angus beef" (*see* www.cabprogram.com).

Nor does the notation that the ads are "*funded by* America's beef producers" make them any less the government's speech to begin with. A highway sign urging motorists to car-pool is no less government speech if it states that it is funded by tolls paid by the users of that highway. Nor is an anti-smoking ad any less government speech if it states that it is funded by cigarette taxes on tobacco companies or consumers. So too here, ads that are funded by mandatory assessments on beef producers and which themselves remain "the property of the U.S. government *as represented by the Board*," *see* 7 C.F.R. § 1260.215(a), are no less government speech simply because they identify the source of funding.

C. The Government Speech Program At Issue Is Subject To Multiple Political Controls.

Respondents do not dispute that adequate political controls exist to ensure responsible government action where general tax revenues are used to fund government speech—in fact, they contend that this is true. *See* Resp. Br. 10, 27, 50. Those same controls, however, ensure responsible action where targeted taxes are used to fund government speech. Beef producers who disagree with Congress's message that "*all* beef is good" can lobby Congress to change its message or vote for members of Congress who support a different message, just like any other taxpayer can when he or she disagrees with government speech. So too, they can lobby the Secretary of Agriculture (or the President, under whom she serves). And, as in the case of any other commodity-specific excise, beef producers can lobby Congress to end the assessments on the sale of cattle.

Indeed, beef producers enjoy *greater* political control over the checkoff program than most citizens do over either general taxes or commodity-specific exactions. The checkoff program itself was initially established by a referendum requiring the approval of a majority of producers voting in the referendum. 7 U.S.C. §§ 2906(a). Moreover, the program is subject to termination or suspension by referendum *at any time* if a majority of producers voting in a referendum so favor. *Id.* § 2906(b). Such a referendum may be held whenever requested by a representative group comprising at least 10% of beef producers. *Id.* The Act's referendum provision ensures that the very individuals who pay assessments have a direct political check over the program.[11]

II. THE BEEF ACT IS CONSTITUTIONAL UNDER THE *CENTRAL HUDSON* ANALYSIS.

The Beef Act is constitutional under the *Central Hudson* analysis as well. *See* NCI Br. 39-46. Respondents argue (Br. 12, 43-44) that the *Central Hudson* test has no applicability in a case, like this, involving the compelled funding of speech. At least six Justices—a majority of this Court—have disagreed. *See Wileman*, 521 U.S. at 491-504 (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) (applying *Central Hudson*); *United Foods*, 533 U.S. at 429-431 (Breyer, J., dissenting, joined by O'Connor and Ginsburg, JJ.) (same). Respondents also assert that the Court "squarely" held in *United Foods* that the mushroom program "could not withstand even *Central Hudson* scrutiny." Resp. Br. 12, 43. To the contrary, in *United Foods* this Court

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[11] Respondents incorrectly assert (Br. 27 n.16) that their petition drive for a referendum was "successful." As an independent accounting firm determined, respondents failed to collect enough valid signatures for a referendum. *See* U.S. Dep't of Agric., *USDA Announces Results of Validation of Beef Petitions* (Jan. 17, 2001). In any event, respondents may seek to renew their referendum challenge (J.A. 32-33; Pet. App. 59a), but their failure to trigger a referendum through democratic means is no reason for a court to void the checkoff program under the First Amendment.

specifically *declined* to apply *Central Hudson* because the government did not rely on it in that case. 533 U.S. at 410.

Respondents' arguments on the merits of *Central Hudson* fare no better. Respondents make no meaningful attempt to demonstrate that the Act does not promote a substantial government interest. That is not surprising, because it cannot be seriously disputed that the principal objective of the Act—ensuring the welfare of the largest segment of the American agricultural economy—is a substantial, if not compelling, government interest. *See* NCI Br. 40-41. Nor do respondents make a meaningful attempt to show that the Beef Act does not directly advance that government interest. Respondents argue (Br. 46) that petitioners must show that the *funding*, not the *advertising*, under the Beef Act advances the government's interest, but that does not follow. The funding enables the government's promotional activities under the Beef Act and thus directly advances the government's interests. Respondents simply ignore the abundant evidence demonstrating that generic advertising under the Beef Act has been highly effective in stimulating consumer demand for beef. *See* NCI Br. 14, 41-42.[12]

Respondents also do not dispute that most producers lack the resources to conduct their own meaningful promotional programs. *See id.* at 44-45. Nor do they dispute that the Beef Act has been critical in ensuring the welfare of the beef industry in the wake of the discovery of a BSE-infected cow

[12] Citing nothing but their own testimony, respondents contend (Br. 5 n.8) that since the Beef Act was enacted cattle prices have fallen and consumption of beef has dropped. Not so. *See* J.A. 170-173 (Ward). In fact, recent statistics show that both cattle prices—which constantly fluctuate and are influenced by a number of factors, including climate—and consumer demand, are up. *See, e.g.*, U.S. Dep't of Agric., *Meat Animals Production, Disposition, and Income, 2003 Summary* 1 (Apr. 2004); Charles Abbott, *U.S. Taste for Beef Raises Cost of Food*, L.A. Times, Mar. 29, 2004. Indeed, prior to the discovery of a BSE-infected cow, U.S. beef prices had reached "record levels." Pia Sarkar, *Demand Pushes Price of Beef to New Peaks*, S.F. Chron., Nov. 4, 2003.

in the United States last year, including in relation to foreign markets. *See id.* at 45 n.13, 46. Indeed, the only thing respondents seriously take issue with under the *Central Hudson* analysis is the conclusion, reached by the Third Circuit in *United States* v. *Frame*, 885 F.3d 1191, 1135 (3d Cir. 1989), that mandatory assessments are necessary to avoid "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost."

Although respondents assert that "there is *no* evidence that a beef promotion program relying on voluntary contributions * * * would not have been successful," Br. 47 (emphasis added), the record itself contains evidence that, because of "the equity concerns" with free riders, a voluntary program would likely fail. J.A. 169. Respondents cite *no* evidence to the contrary. Instead, they argue (Br. 46-47) that Congress was required, at the time it enacted the Beef Act, to make specific findings that mandatory assessments were necessary to prevent free riders. That is incorrect. But, in any event, Congress *has* recognized that the beef checkoff program is designed in part to eliminate the free-rider problem. *See* 7 U.S.C. §§ 7401(a)(5), (b)(10). That free-rider problem is real and substantiated, especially in the beef industry. *See* NCI Br. 44-46; Br. for Amici Cal. Agric. Issues Forum 18-23.

In the end, respondents fall back on their principal argument—that Congress should have funded the Beef Act through general tax revenues. Resp. Br. 49. This Court has made clear, however, that a regulation of commercial speech need not employ the "*least* restrictive means" to accomplish its objectives. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (emphasis added). All that is required is "a *reasonable* fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* (emphasis added; quotation omitted). Such a fit has been amply demonstrated here. *See* NCI Br. 42-46; U.S. Br. 41-42. Indeed, the targeted nature of the assessments helps *ensure* a "reasonable fit." While some taxpayers—*e.g.*, vegetarians or animal-

rights activists—might object to the government's promotion of beef, Congress could reasonably assume that those most likely to agree with its promotion of beef would be those who choose to produce beef. *See Wileman*, 521 U.S. at 470.

III. THE BEEF ACT IS CONSTITUTIONAL UNDER *WILEMAN*.

Respondents concede (Br. 1 n.1) that the beef industry is subject to "some" regulation. That is an understatement, but it alone distinguishes the beef industry from the wholly "unregulated" mushroom industry in *United Foods*. *United Foods*, 533 U.S. at 413. Moreover, unlike in *United Foods*, where "almost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising," *id.* at 412, here, a significant portion of each checkoff dollar is used for something *other* than promotion, such as vitally important research and education activities. *See* NCI Br. 14, 49 n.16.[13] Thus, in sharp contrast to the mushroom handlers in *United Foods*, beef producers are required to associate under the Beef Act and other federal programs for purposes *other* than promotion. *See id.* at 47-49. Accordingly, under *Wileman*, the federal government's regulation of beef should go far enough to tip the constitutional balance in favor of sustaining an Act of Congress and a longstanding government program designed to protect the Nation's most important agricultural product—beef.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed.

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[13] Respondents assert (Br. 3) that 85 to 90% of checkoff funds are spent on generic advertising, but as the very page of the record they cite makes clear (J.A. 265), only about 50% of the Board's budget is spent on generic advertising. *See also* J.A. 47 ($34 million of $67 million annual budget spent on advertising).

Respectfully submitted,

GREGORY G. GARRE
LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

Supreme Court, U.S.
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Nos. 03-1164, 03-1165

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL.,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, ET AL.,
Respondents.

NEBRASKA CATTLEMEN, INC., ET AL.,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN COTTON SHIPPERS ASS'N, THE ATLANTIC COTTON ASS'N, CALIFORNIA COTTON GROWERS, COTTON RESEARCH AND PROMOTION DEFENSE COUNCIL, DELTA COUNCIL, NATIONAL COTTON COUNCIL OF AMERICA, SOUTHERN COTTON ASS'N, SOUTHERN COTTON GROWERS, TEXAS COTTON ASS'N, TEXAS COTTON PRODUCERS AND WESTERN COTTON SHIPPERS ASS'N IN SUPPORT OF PETITIONERS

WILLIAM GILLON
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
Crescent Center, Suite 500
6075 Poplar Avenue
P.O. Box 171443
Memphis, TN 38119
(901) 680-7200

WALTER DELLINGER
(*Counsel of Record*)
PAMELA HARRIS
MATTHEW M. SHORS
ANDREW M. HETHERINGTON*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*admitted only in New York

Attorneys for Amici Curiae

Additional Counsel Listed on Inside Cover

NEAL P. GILLEN
General Counsel
AMERICAN COTTON SHIPPERS ASS'N
1725 K Street NW
Washington, DC 20006
(202) 296-7116

Additional Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Under the Cotton Research and Promotion Act of 1966, as amended, 7 U.S.C. § 2101 *et seq.* ("Cotton Act"), domestic producers and importers of cotton are required to pay assessments similar to the beef-industry assessments at issue in this case. *Amici* are various entities involved in the cotton industry.

The American Cotton Shippers Association ("ACSA") is a trade association of primary buyers, mill service agents, merchants, shippers, exporters and importers of raw cotton. ACSA members handle over 80 percent of the United States cotton sold in domestic and export markets. ACSA members are also involved in the collection of fees assessed under the authority of the Cotton Act, and ACSA members have collected and remitted well in excess of one-half billion dollars to the Cotton Board. ACSA has itself directly contributed $200,000 to the cotton program. The Atlantic Cotton Association, Southern Cotton Association, Texas Cotton Association, and Western Cotton Shippers Association are federated associations doing business in seventeen states throughout the cotton belt. Members of these associations are also members of ACSA.

The California Cotton Growers Association, the Delta Council, the Southern Cotton Growers, and the Texas Cotton Producers are organizations comprised of individual cotton farmers or organizations that are themselves comprised of individual farmers. The National Cotton Council of America is a trade organization that provides a policy forum and

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[1] The parties have given their written consent to the filing of this brief. In accordance with Rule 37.6, counsel for *amici curiae* state that no counsel for either party authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

serves as a government liaison for cotton ginners, warehousers, merchants, cottonseed crushers, cooperatives, and textile manufacturers. The Cotton Research and Promotion Defense Council was organized by cotton producers for the purpose of preserving and defending the constitutionality of the cotton research and promotion program.

The interest of *amici* in this case is substantial and immediate. *Amici* believe that the cotton program is both permissible as a matter of the First Amendment and vital as a matter of national policy. But the program is under constitutional attack, with challenges pending before the United States Department of Agriculture, *see In re Citetec*, CRPA Docket No. 04-0001, and the United States Court of International Trade, *see, e.g., Cricket Hosiery, Inc. v. United States*, Court No. 03-00553. The *Cricket Hosiery* matter has been stayed pending this Court's resolution of the questions presented here.

SUMMARY OF ARGUMENT

The program established under the Cotton Act has led to critical advances in the cotton industry – advances that have allowed the cotton industry to overcome internal collective action problems and external competitive threats. By any measure, the cotton program must be deemed a success. Empirical data show that the program has not only increased consumer demand for cotton, but also reduced production costs and improved the quality of cotton products. As a result, all segments of the cotton industry and the consuming public of the United States have benefited substantially.

Under the decision below, the speech component of programs like the beef and cotton programs – under which a portion of an industry assessment is used to fund industry-wide promotional speech – is virtually *per se* invalid under the First Amendment. What the decision overlooks is the critical fact that the speech component of these programs is integrally related to the programs' research and development aspects. These are *not* programs, as the court below would

have it, that do "nothing more than commercial advertising." Pet. App. 28a. Rather, the advertising is linked inextricably to the research and development, so that when the cotton program, for instance, helps to develop an innovation like "wrinkle-free" cotton, it is able to communicate and capitalize on that breakthrough. Properly understood, these are programs that address collective action problems by requiring industry participants to contribute to an integrated effort to research, develop, *and* promote the relevant product for purposes of strengthening an entire industry.

Amici agree with petitioners that the promotional speech in question constitutes "government" speech that raises no First Amendment concerns. But even if this Court disagrees, the beef and cotton programs, and programs like them, should be upheld for two independent reasons. First, under the *Abood-Keller* line of cases, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990), the programs are permissible in their entirety because their speech components are "germane" to the broader non-speech related goals of the programs. The Court of Appeals mistakenly concluded that the standard applicable under *Abood* and *Keller* is indistinguishable from the intermediate scrutiny that generally governs commercial speech regulations under *Central Hudson*. Pet. App. 19a-20a; *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). In fact, the "germaneness" inquiry under *Abood-Keller* is distinct from, and logically antecedent to, any inquiry under *Central Hudson*.

Second, even assuming that *Central Hudson* governs, programs like the beef and cotton programs easily survive First Amendment scrutiny. They neither restrict the flow of commercial speech to consumers nor compel identification with ideological causes, the traditional vices identified in commercial and compelled speech cases. Instead, they advance substantial governmental interests in sustaining industries crucial to the national economy, and do so by means

precisely calibrated to overcome the collective action problems that threaten those industries. Review under *Central Hudson* is of course fact-intensive, and even similar agricultural commodities programs may vary in ways that affect their First Amendment validity. But the cotton program, with which *amici* are very familiar, is a clear example of a program that readily meets the *Central Hudson* standard.

ARGUMENT

Like the Beef Act at issue in this case, the Cotton Act has been implemented to require industry participants to pay assessments under a regulatory scheme designed to strengthen the industry – in part by promoting pro-industry speech but also by, *inter alia*, funding vital research and development efforts. *See generally* 7 C.F.R. § 1205.510. Together, the Cotton Act and the administrative order promulgated under the Act[2] (collectively, the "Cotton Program") establish an integrated program combining research and advertising components to improve cotton products and promote those improved products to consumers.

The promotional speech generated by the Cotton Program – like the speech generated by the beef program – is properly deemed "government" speech that raises no First Amendment problem. *Cf. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the State is the speaker, it may make content-based choices"). The generic advertising of cotton under the Cotton Program serves the public purposes identified by Congress, is confined to a

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[2] The Cotton Research and Promotion Order ("Cotton Order") was issued on December 31, 1966. *See* Cotton Research and Promotion Order, 31 Fed. Reg. 16,757 (Dec. 31, 1966). Amendments to the Cotton Order were published on December 10, 1991, *see* Animal & Plant Health Inspection Service, 56 Fed. Reg. 6,426, 6,447 (Feb. 15, 1991), and approved in a referendum by cotton producers and importers, *see* Amendment to the Cotton Board Rules & Regulations, 57 Fed. Reg. 29,181 (July 1, 1992); Amendment to the Cotton Board Rules & Regulations, 57 Fed. Reg. 29,431 (July 2, 1992).

message specified by Congress, and is overseen by a government entity – the "Cotton Board" – created by Congress and subject to the supervision of the Secretary of Agriculture. That is enough to make it government speech and to bring it outside the traditional scope of First Amendment review altogether. *See* Brief of Petitioner Nebraska Cattlemen, Inc. ("Nebraska Cattlemen Br.") at 21-39; Petition for Certiorari of Secretary Veneman ("Veneman Petition") at 14-18.

But even assuming, *arguendo*, that the speech at issue is not "governmental" and thus implicates the First Amendment, the speech remains permissible for each of two independent reasons: because it is "germane" to a larger regulatory program, and because it satisfies the *Central Hudson* standard generally applicable to commercial speech regulation.

I. ASSESSMENTS MADE PURSUANT TO THE BEEF AND COTTON PROGRAMS ARE PERMISSIBLE UNDER *ABOOD* AND *KELLER*.

A. Under *Abood* and *Keller*, The Government May Compel Financial Contributions To Speech That Is "Germane" To A Broader And Non-Speech Related Regulatory Purpose.

The financial contributions compelled by the beef and cotton programs are integral parts of broad regulatory schemes that further underlying, non-speech related purposes. That sets them apart from the contributions invalidated by this Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001), which financed nothing more than the advertising speech in question, and brings them squarely within the permissible scope of government regulatory action delineated in cases like *Abood* and *Keller*.

1. At issue in *Abood* was state legislation permitting "agency shop" agreements under which all employees represented by a union, even if not themselves members, were assessed a "service fee" in the same amount as union dues. 431

U.S. at 211. A group of employees argued that the mandatory service fee violated their First Amendment rights by compelling them to contribute financially despite their "ideological[,] . . . moral or religious" objections to both "unionism itself" and specific collective activities undertaken by the unions. *Id.* at 222.

The Court rejected the employees' First Amendment claim and sustained the compelled financial contributions. Recognizing the "incentive that employees might otherwise have to become 'free riders'" – that is, to "refuse to contribute to the union while obtaining benefits . . . that necessarily accrue to all employees," *id.* – the Court balanced the intrusion on employee speech interests against the critical role played by "agency shop" agreements in advancing the larger "system of labor relations" established by federal law. *Id.* at 209, 211. Ultimately, the Court concluded, the balance tipped in favor of Congress's regulatory objectives, at least so long as the compelled contributions were used to fund activities "germane" to the union's larger role in the labor relations scheme. *Id.* at 235.

The Court applied the same "germaneness" standard when it considered an analogous challenge in *Keller*. There, members of a state bar association argued that use of mandatory bar dues to finance certain "ideological or political activities to which they were opposed" violated the First Amendment. 496 U.S. at 4. Again, the Court rejected the challenge. Noting the same "free rider" problem it had identified in *Abood*, *id.* at 12, the Court held that the state's larger interest in regulating the legal profession and improving the quality of legal services justified compelled assessments "germane" to those goals, *id.* at 13-14.

2. In *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 474 n.18 (1997), the Court expressly invoked the *Abood-Keller* "'germaneness' test" in reviewing the constitutionality of fees assessed pursuant to an agricultural commodities program much like the one at issue here. The Court

held that compelled contributions for generic advertising did not violate the First Amendment because the advertising was "germane" to the larger purposes of the government program. *Id.* at 473. Indeed, applying *Abood* and *Keller*, the Court concluded that the contributions in question were significantly *less* objectionable than those in its prior "germaneness" cases, because they did not compel support of any "political or ideological" view. *Id.* at 469-70 & n.14.

Importantly, the Court made clear in *Glickman* that the "germaneness" test it was applying was different from, and less rigorous than, *Central Hudson*'s intermediate scrutiny. The court below appears to have believed that there is no material difference between review under *Abood-Keller* and review under *Central Hudson*. App. 19a-20a. But *Glickman* expressly *rejected* application of *Central Hudson* once the "germaneness" standard had been satisfied, in favor of the more generous "standard appropriate for the review of economic regulation." 521 U.S. at 469.[3] It is true that there may be some overlap between the two analyses; the promotional activities of the Cotton Program, for instance, are "germane" to a larger regulatory interest for some of the same reasons they are permissible under *Central Hudson*. *See infra* at 16 - 26. But after *Glickman*, at least, it is clear that the two inquiries are distinct, and that a program that meets the "germaneness" standard of *Abood-Keller* need not be subjected to heightened scrutiny under *Central Hudson*.

The Court applied the "germaneness" test again to an agricultural commodities program in *United Foods*, this time finding that the germaneness condition was not met. In *United Foods*, the Court was confronted for the first time with a "marketing scheme" whose *only* object was to "generate the very speech to which some [compelled participants]

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[3] *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1457 (1989) ("germaneness" test and "means-end" review "serve different functions").

object." 533 U.S. at 415; *see also id.* ("The *only* program the Government contends the compelled contributions serve is the very advertising scheme in question.") (emphasis added); *id.* at 418 (Stevens, J., concurring) (case "raise[d] the open question whether such compulsion is constitutional when *nothing more* than commercial advertising is at stake") (emphasis added). Indeed, the Solicitor General appears to have conceded that point, arguing that the "generic advertising program alone" was permissible. Brief for the Petitioners, *United States v. United Foods, Inc.*, No. 00-276, at 25, 29.

Because the program served no larger, non-speech related purpose, the Court held, there was nothing to which the speech could be deemed "germane." "Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." 533 U.S. at 415. Instead, there must be some reason, independent of the speech itself, that justifies the compelled association in the first place; only then does the germaneness inquiry become meaningful. *Id.* at 413-14.

3. The standard coming out of *Abood-Keller*, as refined by *Glickman* and *United Foods*, is clear: compelled contributions for speech activities are permissible under the First Amendment so long as the speech is "germane" to an independent, non-speech related purpose. It is only compelled funding of speech for its own sake that is subject to a different analysis under *United Foods*.

To the extent there is any confusion on this point, it flows from the fact that the Court in *Glickman* also relied on a separate and independent rationale for sustaining the commodities program at issue: the "collectivist" goals of the statutory scheme. 521 U.S. at 474-77. That determination, however, comes only after the Court has concluded already that germaneness under *Abood* is sufficient grounds for upholding the contributions. *Cf. id.* at 469-74. And though *United Foods* does address (as it must) both of *Glickman*'s alternative rationales in the course of invalidating a com-

modities program, it does not hold or even suggest that "collectivization" has somehow become a prerequisite to constitutionality under the *Abood-Keller* line of cases.[4]

B. The Speech Aspects Of The Beef And Cotton Programs Meet The "Germaneness" Test Of *Abood* And *Keller*.

The court below purported to apply the *Abood-Keller* line of cases. Pet. App. 18a-19a. Where it went critically wrong, however, was in its determination that the beef program does "nothing more" than commercial advertising, so that it is materially identical to the program invalidated in *United Foods*. *Id.* at 28a. In fact, the beef program, like the Cotton Program, combines promotional speech aspects with substantial research and development components. *See* Veneman Petition at 29-30; Brief for Petitioner Nebraska Cattlemen at 13-14.[5] But even if a particular research and promotion program

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[4] Even if a "collectivist" statutory scheme were required by the First Amendment – which it is not – programs like the Cotton Program should survive review. Since the Great Depression, the United States government has actively regulated the cotton industry, using mechanisms ranging from tariffs and quotas to marketing restrictions, acreage allotments, set-asides, acreage limitation programs, price supports, direct payments, commodity loans, income support payments, and other subsidies. Brian C. Murray *et al.*, Research Triangle Inst., *An Economic Analysis of the Cotton Research and Promotion Program* 3-16 to 3-17 (2001). In exchange for complying with federal regulations, cotton producers receive the *quid pro quo* of valuable federal subsidies and have participated in industry-wide production adjustment programs. *See, e.g.*, 7 C.F.R. § 1427.5 (conditions for receipt of subsidies in form of "nonrecourse" loans). That kind of intensely regulatory and cooperative program reflects the same "collectivist" purposes as the commodities program in *Glickman*. *See* 521 U.S. at 474-77. But in any event, and more important here, it takes the Cotton Program *outside* the "speech-only" limitation established by *United Foods*. *See* 533 U.S. at 415.

[5] At the petition stage of this case, the Solicitor General took the position that the "*Abood-Keller* analysis cannot provide a basis for sustaining programs of compelled funding exclusively *or primarily* for generic advertising and promotion." *See* Veneman Petition at 24 n.7 (emphasis

could be described as involving "nothing more" than speech for its own sake, *cf. United Foods*, 533 U.S. at 418 (Stevens, J., concurring), the Cotton Program could not. The speech element of the Cotton Program is not only "germane" to, but also integrally linked with, a much broader research and development agenda, all for the non-speech purpose of strengthening an economically critical industry.

1. The Cotton Act and the Cotton Program were designed to and do advance a significant non-speech related purpose: strengthening a critical industry severely threatened, and doing so in a way that should reduce industry reliance on government controls and subsidies.

There can be no question but that the cotton industry is critical to the national economy. In adopting the Cotton Act, Congress concluded as much: "The efficient production of cotton and the maintenance and expansion of existing markets and the development of new or improved markets and uses is vital to the welfare of cotton growers and those concerned with marketing, using, and processing cotton *as well as the general economy of the Nation*." 7 U.S.C. § 2101 (emphasis added).

It is equally clear that at the time the Cotton Act was passed in 1966, the cotton industry was in crisis. From 1930 to 1960, the cotton share of the total domestic fiber markets dropped from 85 percent to 65 percent; between 1960 and 1966 it dropped even more sharply, down to 53 percent. *See* S. Rep. No. 89-1272, at 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2479, 2482. The principal cause was clear:

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added). To the extent that the Solicitor General reads *United Foods* as invalidating compelled contributions to any program of which generic advertising is some part – even a substantial part – *amici* disagree. *United Foods* dealt only with programs devoted *exclusively* to speech activities. *See supra* at 7-8. The validity of the beef program, which, like the Cotton Program, combines promotion with research to serve non-speech related ends, is not foreclosed by *United Foods*.

the external competitive threat posed by "noncellulosic," or "synthetic" fibers. At the same time that cotton's market share was declining, synthetic's share was increasing at roughly the same rate. Timothy Curtis Jacobsen & George David Smith, *Cotton's Renaissance: A Study in Market Innovation* 198 fig.8 (2001).

Faced with this crisis, Congress determined that neither production and marketing restrictions nor subsidies, which had already been provided in "high and rising" amounts, would be enough. S. Rep. No. 89-1272, at 11, *reprinted in* 1966 U.S.C.C.A.N. at 1489. Production and marketing adjustment programs and subsidies are principally supply-side measures, and as such, Congress concluded, did not offer the industry's best hope for either reducing production costs or increasing consumer demand. *Id.* Indeed, Congress hoped that the Cotton Act would not only obviate the need for additional subsidies, but actually help to "reduce or eliminate the need for . . . supporting the price of cotton" through subsidization. *Id.* at 6-7, *reprinted in* 1966 U.S.C.C.A.N. at 2484-85. As Representative Resnick explained, "[T]he Federal Government has a bigger stake in cotton than in any other agricultural commodity. We must do something about reducing this stake. I know of no better way [than the Cotton Act]." 112 Cong. Rec. 4,837 (1966).

The underlying purposes of the Cotton Act – saving the cotton industry, and transitioning away from heavy industry dependence on production and marketing restrictions and costly subsidies – have nothing to do with speech and everything to do with purely economic regulation, properly subject to the *Abood-Keller* standard. *See Glickman*, 521 U.S. at 469 (applying "standard appropriate for the review of economic regulation"). The fact that the *means* to Congress's end involves a speech component does not change the analysis. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), for instance, the Court considered a "must-carry" rule that compelled cable operators to serve as conduits for broad-

cast speech. But the Court declined to impose the strict scrutiny generally applicable to such content-based speech regulations because the *purpose* behind the rule was economic: saving the broadcast industry from the threat posed by cable. *Id.* at 659 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry. Thus, the fact that the provisions benefit broadcasters and not cable programmers does not call for strict scrutiny under our precedents."). As this Court later explained, "[t]he Government's interest . . . was not the alteration of speech, but the survival of speakers." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577 (1995). Here, too, the economic purposes behind the Cotton Act bring it squarely within the *Abood-Keller* rule.

2. The speech component of the Cotton Program is "germane" to the Program's larger regulatory ends. Indeed, the promotional speech funded by the Cotton Program works hand in glove with research and development efforts – financed by the same assessments – to serve the non-speech related interest of advancing the cotton industry.

From the start, it has been clear that the Cotton Program is about more than increasing consumer demand through advertising. Rather, advertising is just one element in a coordinated campaign that also works to improve the quality of cotton products and lower the costs of cotton production. As the Act itself provides, assessments are intended to "carry[] out an effective and continuous coordinated program of research and promotion." 7 U.S.C. § 2101; *see also* 112 Cong. Rec. 4,816 (1966) (statement of Rep. Cooley) ("[W]e need more money for promotion and research. We want to reduce the cost of producing this fiber. We want to make it more attractive and more durable so the consumer can profit."). And the Cotton Order requires the Cotton Board to "establish[] and

carry[] on . . . research and development projects and studies with respect to the production, ginning, processing, distribution, or utilization of cotton and its products . . . ." 7 C.F.R. § 1205.333(b). The Cotton Board, in turn, has consistently emphasized research and development projects. *See* Jacobsen & Smith, *supra*, at 140. Indeed, in 1999, the Cotton Board opened a $19 million research center in Cary, North Carolina that is equipped with the latest technology for conducting cotton agriculture, fiber, and textile research and development.

The research and development aspects of the Cotton Program have been extraordinarily successful. To take only a few examples, assessments under the Cotton Program have helped develop pest-resistant cotton, wrinkle-free cotton, stretch fabrics, and flame-resistant cotton. The Cotton Program has also been responsible for stimulating production improvements: improvements in fiber quality and processing, fabric production, fabric development, cotton seed research, and ginning technology research. *See id.* at 218-31, 234-51 262-71; Oral Capps, Jr. *et al.*, Dep't of Agric., Tex. A&M Univ., *Economic Evaluation of the Cotton Checkoff Program* 14-15 (1996); Cotton Inc., 2003 *Annual Report* 16 (2004);[6] Cotton Inc., 2002 *Annual Report* 10-12 (2003); Cotton Inc., 2001 *Annual Report* 11-12 (2002). All of those developments have been assisted substantially by the Cotton Program, and some would likely not have occurred without it.

The influence of the Cotton Program has been critical in helping to tie together a market that is geographically dispersed and comprised of numerous small producers. The Cotton Board serves as a "true clearinghouse for scientific information" and a means of "disseminating practical know-how to growers nationally." Jacobson & Smith, *supra*, at

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[6] An executive summary of the report is available at http://commodity.aem.cornell.edu/nicpre/newslet/vol3no2/pg2.htm.

239.[7] The Cotton Board's efforts (directly and through its contractors) have helped tie together other less comprehensive research efforts and have helped ensure that cotton research is focused on the long-term and is broadly based.

The speech aspect of the Cotton Program works in tandem with the research and development efforts, functioning as the "primary conduit" through which new advances "reach cotton consumers." Murray, *supra*, at 2-9. Some of the results generated by the Program's research efforts would have achieved their purposes apart from any advertising. Others – those geared more to consumers, such as wrinkle-free and stretch cottons – depend on a coordinated promotional campaign for their success. In that broad class of cases, promotion and research and development function as integrated and mutually-reinforcing aspects of a single program: the availability of a promotional campaign creates additional incentives to develop new and improved cotton products, and the research and development work financed by the Cotton Board generates advances worthy of broad dissemination. *Cf.* Jacobsen & Smith, *supra*, at 140 (Cotton Board has avoided "overpromot[ing]" what the industry "could not yet produce").

Congress, of course, could have established a cotton program that did not include a speech component – but that would only have undermined its substantial non-speech interest in advancing the cotton industry by improving its processes and products. Nothing in *United Foods* or any other case requires that counter-productive result. The promotional aspect of the Cotton Program is not only "germane" but critical to achievement of the Program's larger and non-speech

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[7] The Beef Board has served a similar function, coordinating significant research and educational efforts. *See* Nebraska Cattlemen Br. at 13-14.

related purposes. Under *Abood* and *Keller*, that is sufficient to make it permissible under the First Amendment.[8]

3. The Cotton Program is on all fours with the programs sustained in *Abood* and *Keller* in another respect, as well. In both those cases, the Court recognized the "free rider" problem that necessitated mandatory collective action: without compelled assessments, individual participants would have every incentive to withhold contributions and then profit from the generalized benefits produced by the program. *Abood*, 431 U.S. at 222; *Keller*, 496 U.S. at 12. Congress made precisely the same determination with respect to the Cotton Act, concluding that collective action induced by "uniform[]" federal legislation was necessary to advance its economic interests. *See, e.g.*, S. Rep. No. 89-1272, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 2481.

Congress was right. At the time the Cotton Act was passed, there were hundreds of thousands of different domestic cotton producers. *See id.* None of those small producers had an incentive, on its own, to invest sufficient resources to pursue effective research and development programs. The synthetic market, by contrast, was highly concentrated, with the eight largest firms controlling 90 percent of the market. *Id.* at 3, 6, *reprinted in* 1966 U.S.C.C.A.N. at 2481, 2484. As a result, large synthetic firms devoted significant resources to research and promotion, which together amounted to $205 million (of which $135 million went to research) in 1965 alone. *Id.* at 6, *reprinted in* 1966 U.S.C.C.A.N. at 2484. The "combined public and private outlays for development and promotion of cotton," on the other hand, amounted to less than 15 percent of that amount. *Id.*

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[8] The Cotton Program (like the beef program) presents no question as to whether a minimal research and development effort may be used as a kind of "fig leaf" to protect a program that is in actuality all about advertising. Research and development has historically been a substantial part of the Cotton Program's budget, as well as a significant and successful part of its output. *See supra* at 12-13.

With full understanding of those facts, Congress concluded that purely private efforts by cotton industry participants were unlikely to yield the kind of research, development, and promotion required to save the industry from the threat posed by synthetics. Instead, Congress determined that a federal program was required in order to overcome internal market failures so that thousands of small cotton producers could survive against their larger and more concentrated rivals. *See* 7 U.S.C. § 2101 ("The production and marketing of cotton by numerous individual farmers have prevented the development and carrying out of adequate and coordinated programs of research and promotion."); *see also* S. Rep. No. 89-1272, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 2481 (noting that prior self-help efforts by the industry had failed). That kind of economic regulatory decision is well within Congress's purview under *Abood* and *Keller*.

II. THE BEEF AND COTTON PROGRAMS MEET THE *CENTRAL HUDSON* STANDARD FOR COMMERCIAL SPEECH REGULATION.

This Court has not previously applied *Central Hudson* to cases like this one, involving compelled financial contributions to commercial promotional programs. *See Glickman*, 521 U.S. at 474; *United Foods*, 533 U.S. at 410 (unnecessary to reach question whether *Central Hudson* applies). The case does not implicate the traditional speech interests at issue in commercial speech or compelled speech cases: nothing about the promotional component of the beef program (or the Cotton Program) restricts the flow of commercial speech to consumers, or compels identification with ideological or political causes. *See infra* at 20-21. A more forgiving form of First Amendment review may therefore be appropriate. *See Zauderer v. Office of Disciplinary Counsel of Supreme Ct.*, 471 U.S. 626, 651 (1985) (although commercial disclosure requirements "implicate" the First Amendment, an "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest").

At the very most, however, the compelled financial contributions at issue under the beef and cotton programs warrant application of intermediate scrutiny under *Central Hudson*. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (reaffirming that *Central Hudson* governs commercial speech restrictions). Under that standard, truthful and nonmisleading commercial speech may be regulated so long as the regulation (1) serves a substantial governmental interest, (2) directly advances that interest, and (3) is not more extensive than necessary to serve the interest. *Cent. Hudson*, 447 U.S. at 566. In order to satisfy the second and third prongs of this test, there need only be a "reasonable" and not a "perfect" fit between the identified problem and the government's solution; *Central Hudson* is not equivalent to a strict scrutiny or "least restrictive means" test. *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989). Programs like the Cotton Program easily pass review under *Central Hudson*.

1. The governmental interests underlying the Cotton Act – preservation of the cotton industry and decreased dependence on government production limitations and subsidies – are "substantial" for *Central Hudson* purposes. Those interests, as well as the dire condition of the cotton industry when the Cotton Act was passed in 1966, are described in Part I.B. above. *See supra* at 10-11. The industry in 1997 employed over 440,000 individuals and generated an annual revenue of $40 billion. *See* Murray, *supra*, at 3-1. It thus remains the case that "maintenance and expansion" of existing markets and "development of new or improved" cotton products and processes is "vital" not only to the cotton industry but also to the "general economy of the Nation." 7 U.S.C. § 2101.[9]

2. The "fit" between the Congress's goals and the Cotton Program it employed to meet them is more than "reason-

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[9] The beef program at issue in this case serves comparable interests in ensuring the health of the beef industry and thus protecting the nation's economy as a whole. *See* Nebraska Cattlemen Br. at 40.

able." *Cf. Fox*, 492 U.S. at 480. The very success of the Program in achieving its stated purposes compels that conclusion. As described above, the research and development efforts undertaken by the Cotton Board have fostered numerous advances in both cotton production and the quality of cotton products. *See supra* at 13-14. Together with the substantial and coordinated promotional efforts undertaken by the Cotton Board, those advances have had precisely the intended effect: they have allowed the industry to regain market share and compete on a more equal footing with synthetic fibers. *See generally* Murray, *supra*, at ES-11 ("strong and positive effect" on demand for cotton). After reaching a market-share low of 34 percent in 1973, cotton has enjoyed a steady increase in market share to approximately 60 percent of the consumer apparel and home furnishings markets in 1997. Jacobson & Smith, *supra*, at 198 fig.8. And there should be no question but that much of that resurgence is a direct result of the Cotton Program; outside the United States, cotton's market share has continued to erode since 1973.[10]

The benefits of the Cotton Program have accrued to cotton producers and the United States government alike. By improving cotton production processes and reducing production costs, the Cotton Program has directly benefited cotton producers. By increasing demand for improved cotton products, the Cotton Program has, as Congress expected, increased producers' revenues while at the same time substantially reducing the necessity for production and marketing adjust-

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[10] "The United States has been the world leader in generic cotton promotion since the 1960's. The larger [non-price components for demand] estimates for North America indicate a fairly consistently larger role for permanent change compared with other developed regions." Stephen McDonald, Econ. Research Serv., U.S. Dep't Agric., *Global End-Use Demand for Cotton: A Time-Varying Parameter Model* 280, *in* 1 *Proceedings of the Beltwide Cotton Conference* 278-82 (Nat'l Cotton Counsel 1997).

ment programs and significantly affecting the nature and scope of federal government subsidies.[11] In short, the Cotton Program has materially achieved its goals. *See Cent. Hudson*, 447 U.S. at 566 (commercial speech regulation permissible where it "directly advances" asserted interests).

3. The "fit" inquiry also asks whether the government's response to a perceived problem is "'proportion[al]'" – that is, whether it impinges unnecessarily broadly on speech interests. *See Fox*, 492 U.S. at 469 (citation omitted); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (commercial speech regulation must be "narrowly drawn" to achieve its purpose). The speech aspect of the Cotton Program is entirely proportional to the problem presented: it

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[11] *See* H.R. Rep. No. 100-339, at 11 (1987) (letter from Edward M. Gramlish, Acting Director, Cong. Budget Office) ("It is likely that increased promotional expenditures by the Cotton Board would increase domestic cotton consumption, and therefore reduce [Commodity Credit Corporation] expenditures for its cotton program."). The effect of the Cotton Program on federal government subsidies depends in part on the price of cotton. Under the federal marketing loan program, producers repay loans at the lower of the specified loan rate or a market price determined by the USDA. As the price of cotton increases towards that loan rate, producers repay progressively larger amounts to the government that they would otherwise not have to repay. For example, using the 2002-03 loan rate of 52 cents per pound, and applying average acreage and yields, we can calculate that for prices below 52 cents per pound a 1-cent increase would be expected to save the government $85 million per year in marketing loan costs. *See* 7 U.S.C. §§ 7914(c)(4), 7932(a)(6).

The Cotton Program also affects the need for production and marketing restrictions. The Agriculture Act of 1949 – the seminal statutory authority for the United States cotton program – authorizes not only very high levels of subsidization, but also marketing and planting restrictions. Those restrictions were commonly imposed throughout the 1950s and early 1960s. But as the demand for cotton and cotton products increased, Congress was able to suspend temporarily many of the 1949 Act's most onerous restrictions in favor of less restrictive subsidy programs with different levels of support. *See, e.g.*, S. Rep. No. 91-1154, at 4799 (1970) (statement of Sen. Ellender).

impacts speech interests only peripherally, and is precisely tailored to the collective action problem it addresses.

a. Like the beef program, the Cotton Program has only an indirect and minimal impact on cognizable speech interests. None of the concerns underlying this Court's commercial speech doctrine are even implicated by either program. Congress did not, in adopting the Cotton Act, seek to restrict the flow of information to the public in a paternalistic effort to prevent "bad choices." *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). Indeed, the Cotton Program does not for any reason restrict the flow of information to the public – the principal vice at which commercial speech doctrine is aimed. On the contrary, the Program disseminates information to consumers, thus furthering the First Amendment interest in public access to commercial information. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," compelled commercial speech simply does not raise the same First Amendment concerns as restrictions on commercial speech. *Zauderer*, 471 U.S. at 651 (affirming commercial disclosure requirement; "constitutionally protected interest in not providing any particular factual information in . . . advertising is minimal").

The speech interests ordinarily protected by the compelled speech doctrine are not implicated here, either. The cotton and beef programs do not require participants to speak, but only to make financial contributions. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (compelled flag salute and pledge required "affirmation of a belief and an attitude of mind"). That financial contribution is not used to convey an "ideological" message, but only a "commercial" one. For that reason, the intrusion on speech

interests here is even less significant than that in *Abood* and *Keller*. *See Glickman*, 521 U.S. at 469-70 & n.14. Finally, there is no serious risk that the promotional efforts undertaken by the Cotton Board or its beef counterpart will be perceived as speech of or endorsed by any one particular producer. *Cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (no First Amendment violation where, *inter alia*, "views" expressed by speaker "will not likely be identified with" objector).

b. Any marginal intrusion on speech interests occasioned by the Cotton Program's compelled assessments is narrowly tailored to the problem before Congress. As explained above, what Congress faced when it established the Cotton Program was a classic market failure: no one of the hundreds of thousands of small cotton producers had any incentive to contribute to research, development and promotion efforts that would produce generalized benefits for the industry as a whole. For that reason, Congress found, any program founded on purely voluntary efforts was likely to fail. *See supra* at 15-16; *cf. Turner Broad.*, 520 U.S. at 195-96 (in considering fit under intermediate scrutiny, courts should give substantial deference to legislative conclusions that inform regulatory decisions). And while Congress could in theory have simply decided to fund a cotton program entirely by itself, that would undermine, not further, its goal of reducing industry reliance on government intervention and subsidies. *See supra* at 11.

Even so, Congress made every effort to accommodate potential objectors when it passed the Cotton Act. In its original form, the Cotton Act's provisions were "voluntary" in that any producer could seek a refund of an assessment. The Act also exempted from its coverage cotton grown abroad and imported into the United States. Cotton Research and Promotion Act, § 3, Pub. L. No. 89-502, 80 Stat. 279, 280 (1966). But in 1990, Congress determined that the "voluntary" nature and narrow scope of the Cotton Program were

threatening its success, as the percentage of producers utilizing the refund procedure grew from 10 percent in 1976 to 35 percent by the late 1980s. The culprit, Congress concluded, was not any sense among producers that the Program was failing to assist the industry, but rather the "free rider" problem that had dogged the industry from the start: producers were becoming increasingly aware that *other* producers were opting out of or exempt from the Program, and enjoying the Program's benefits without incurring any of its costs, and hence increasingly resistant to carrying their own share. *See Research and Promotion Proposals Introduced in this Congress: Hearing Before the Senate Subcomm. on Domestic and Foreign Mktg. and Prod. Promotion of the Comm. on Agric., Nutrition and Forestry*, 101st Cong. 40 (1989) (statement of W. Bruce Heiden, President, National Cotton Council of America). It was only at that point – having tried and failed with a narrower program – that Congress finally eliminated the refund procedure and extended the assessments to importers of foreign cotton subject to taxation. *See* Cotton Research and Promotion Act Amendments of 1990, Title XIX, Subtitle G, Pub. L. No. 101-624, 104 Stat. 3359, 3909-14 (1990). The current scope of the Cotton Program is thus precisely tailored to the "free rider" problem it seeks to resolve.[12]

3. Against that strong case for the First Amendment validity of programs like the beef and cotton programs, challengers raise one principal objection: they do not want to contribute to a "generic" pro-industry message. In the cotton case pending before the Department of Agriculture, for example, the challenger has asserted that it "does not wish to support" a "generic message" that "cotton is better than other fibers." *See* Emergency Petition to Correct Constitutional

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[12] The history of the beef program shows a similar congressional concern with a "free rider" problem in the beef industry, and similarly calibrated efforts to address that concern. *See* Nebraska Cattlemen Br. at 43-44.

Violation, *In re Citetec*, No. CRPA 04-0001, ¶¶ 6, 16 (U.S. Dep't of Agic. filed Nov. 7, 2003) ("Emergency Pet."). That basic objection generally takes one of two forms. Some challengers argue that such programs "interfere[] with the promotion efforts of individual firms by depleting and wasting scarce resources and by sending a competing message to consumers," *id.* at ¶ 19; others, that they disagree with the content of the "generic" message to the extent it suggests that all forms of the product are alike.[13] In either form, the objection is fundamentally misplaced.

The first argument, that agricultural commodity programs interfere with the advertising efforts of individual participants, is based largely on the unstated assumption that assessments paid under the programs reduce the money available to participants to support their own commercial speech. That is provably false. With respect to the Cotton Program, for instance, expert empirical data show that the "return on investment" in the Program has far exceeded one-to-one.[14] At the mill level, for example, the net return for the Program nas been in the range of $7.12 to $8.14 per dollar of investment; at the cotton producer level, the net return has been $3.23 to $3.49;[15] and for importers, $3.63 to $4.33. Capps,

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[13] That objection can be taken to absurd extremes. In the beef-program litigation below, for instance, plaintiffs objected to generic advertising for steak on the ground that their product is not steak but cattle – the same cattle, of course, from which steak is ultimately produced. *Livestock Mktg. Ass'n v. U.S. Dep't. of Agric.*, 207 F. Supp. 2d 992, 1002 (D.S.D. 2002) (plaintiffs who sell live cattle "object to having to pay for the advertisement of steak, which is not the product that they sell").

[14] The beef program has likewise generated a positive return to its participants. *See* Affidavit of Ronald W. Ward at 13, Joint Appendix ("J.A.") 172 (beef program has resulted in average net gains of $5.67 per dollar of investment).

[15] Depending on the actual price of cotton in any given year, net returns from the Program will not necessarily translate into an increase in gross income for cotton producers, because the rate at which producers

supra, at iii. Far from "depleting and wasting scarce resources," *cf.* Emergency Pet. ¶ 19, the Cotton Program has provided a return on investment that should fully permit participants so inclined to engage in their own advertising.

That has not happened for a reason that goes directly to the validity of the objections to the Cotton Program. However much Program participants may claim they "disagree" with the "generic" message of the Program's promotional efforts, they have historically made little effort (particularly at the producer level) to distinguish, or "brand," their own cotton. And the problem is not the Cotton Program, but the very structure of the industry: because the total market is spread across so many thousands of participants, individual participants rarely have any significant incentive to invest in individual product branding. *See* Affidavit of Ronald W. Ward at 3-4, J.A. 168-69 (producers of agricultural goods are unable to effectively communicate with public absent industry wide program due to small market share per producer and negligible differentiation between product of each producer).

In any event, an individual participant is free to disassociate itself from the Cotton Board's speech if it so desires. Nothing in the Cotton Program either restricts commercial speech or in any way restrains participants from disagreeing with the content of the Cotton Board's generic advertising. If, for example, a participant disagrees with the "generic" content of the Program's promotions because it believes that its own product is superior, then the participant is free to make that claim. Indeed, by benefiting the participant financially, the Cotton Program actually *enhances* the participant's ability to differentiate its product through branding and separate advertising. The fact that such differentiation does not generally occur at the participant level is a result of structural industry conditions, not the Cotton Program.

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must repay federal marketing loans depends upon the price of cotton. *See supra* at 19 n.11.

At bottom, the central objection to the Cotton Program, the beef program, and other programs like them is exactly the one this Court rejected in *Abood*: some participants wish to "'withdraw [their] financial support" because they "disagree with the group's strategy" or simply because they want to keep their money. *See* 431 U.S. at 223 (quoting *Int'l Ass'n of Machinists v. Streets*, 367 U.S. 740, 778 (1961)); *see also* Emergency Pet. ¶¶ 6, 16, (cotton is "so diverse that no single generic program" can properly promote it).[16] But the decision as to how to best regulate the cotton industry is Congress's to make. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) ("a constitution is not intended to embody a particular economic theory") (Holmes, J., dissenting). And the unwillingness of some participants to contribute to promotional speech that is a critical part of an inarguably successful program is nothing more than proof of the very collective action problem that demanded passage of the Cotton Act in the first place.

4. As demonstrated by the discussion above, review under *Central Hudson* is decidedly fact-specific, requiring thorough consideration of a record, assessment of the specific contours of a program or regulation, and careful balancing of particular governmental interests against particular speech interests. *See Cent. Hudson*, 447 U.S. at 563 ("protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation"); *Turner Broad.*, 512 U.S. at 668 (remanding for development of "more thorough factual

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[16] Any significant disagreement with Cotton Board strategy may be addressed through an industry referendum; any amendment to the Cotton Program must be approved by a majority vote. *See* 7 U.S.C. § 2107(a). And the Cotton Board itself is composed of members from every cotton-producing state, as well as from eligible importer organizations, *see* 7 C.F.R. § 1205.324, and roughly reflects the proportion of domestic cotton producers to importers. There is thus no concern that the Board does not fairly reflect the interests of the cotton industry as a whole.

record"). It would be impossible for a single bright-line rule under *Central Hudson* to take account of the material differences among agricultural commodity programs, and the Court should take care, if it applies *Central Hudson* in this case, to do so in a way that is sensitive to those differences.

The Cotton Program, for instance, has what is in many ways a unique history. It arises from decades of federal efforts to support the cotton industry through a complex regulatory regime and now functions as a critical component of that larger effort. *See supra*. The future of the Cotton Program, too, raises unique considerations. The federal government's cotton subsidies are now at issue in proceedings before a dispute panel of the World Trade Organization ("WTO"), which has issued an opinion that, though not public, is reportedly adverse to the United States. That decision will be appealed, and *amici* believe that the subsidies are fully consistent with United States trade obligations. But if those subsidies are determined to be contrary to United States treaty obligations within the WTO, then the Cotton Program will become even more critical to the very survival of the United States cotton industry. That kind of industry-specific fact should weigh importantly in striking the proper balance under *Central Hudson*.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

WILLIAM GILLON
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
Crescent Center, Suite 500
6075 Poplar Avenue
P.O. Box 171443
Memphis, TN 38119
(901) 680-7200

NEAL P. GILLEN
General Counsel
AMERICAN COTTON SHIPPERS
ASS'N
1725 K Street NW
Washington, DC 20006
(202) 296-7116

WALTER DELLINGER
(*Counsel of Record*)
PAMELA HARRIS
MATTHEW M. SHORS
ANDREW M. HETHERINGTON*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*admitted only in New York

Attorneys for Amici Curiae

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ANN VENEMAN, SECRETARY UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,

Respondents.

NEBRASKA CATTLEMEN, INC., ET AL.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BILL LOCKYER, Attorney General of the State of California
RICHARD M. FRANK
Chief Deputy Attorney General
MARY E. HACKENBRACHT
Senior Assistant Attorney General
LINDA L. BERG*
Deputy Attorney General
P.O. Box 944255
1300 I Street
Sacramento, CA 94244-2550
Telephone: (916) 327-5484
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§ 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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USDA, News Release, National Agricultural Statistics Services, USDA Releases 2002 Census of Agriculture, *available at* http://www.usda.gov/nass/events/news/ consusjune3release.htm 8

STATEMENT OF INTEREST

The State of California, through its Attorney General, submits this *amicus curiae* brief in support of petitioners.[1] The State of California has vital interests in this matter because more than 60 percent of California's $26 billion agricultural industry is regulated through state marketing programs that are analogous to the beef program at issue in the present case.[2]

California is the largest agricultural producer and exporter in the United States. California produces more than 350 different crops, including more than half of the

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[1] California does not disagree with the positions taken in the *amicus* brief of Texas and 32 other states and Puerto Rico, but submits this brief to provide the Court with its unique perspective gained from its extensive experience with generic marketing programs.

[2] California Department of Food and Agriculture, Marketing Branch, *What do Marketing Programs do – who benefits from them?*, *at* http://www.cdfa.ca.gov/mkt/mkt/mktb-4.html (last visited Aug. 17, 2004). In addition, although California nectarines, peaches, almonds, and olives are not governed by state orders, they are governed by federal marketing orders. 7 C.F.R. Parts 916, 917, 932. California pears, kiwifuit, desert grapes, almonds, walnuts, raisins and dried plums are governed by both state and federal marketing programs. *Compare* 7 C.F.R. Parts 917 (pears), 920 (kiwifruit), 925 (desert grapes), 984 (walnuts), 989 (raisins) *and* 993 (dried prunes) *with* California Pear Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/pear.pdf (last visited Aug. 17, 2004), Cal. Food & Agric. Code §§ 68001-68140 (West 1997) (kiwifruit), Cal. Food & Agric. Code §§ 65500-65675 (West 1997) (table grapes), Cal. Food & Agric. Code §§ 77001-77195 (West 1997) (walnuts), Marketing Order for California Raisins, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/raisin.pdf (last visited Aug. 17, 2004), *and* Marketing Order for California Dried Plums as Amended, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/raisin.pdf (last visited Aug. 17, 2004).

nation's total of fruits, nuts and vegetables.[3] It is the leading domestic producer of 75 different crop and livestock commodities and is the sole domestic producer of several products, including almonds, artichokes, raisins, nectarines, and walnuts.[4]

Agriculture is a vital part of California's economy. In 2001, the gross cash income from California agriculture was $27.6 billion.[5] Agriculture provides 15.1 percent of the jobs in the state.[6] California leads the nation in agricultural exports, shipping more than $6.5 billion in food and agricultural commodities annually.[7]

Agriculture has an importance over and above its contributions to California's economy. California's "laws reflect a long-standing political judgment that 'agriculture' – unlike bicycle manufacturing or clothing production, for example – cannot be allowed to disappear from the American economy because of untrammeled market forces . . . ." *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 524 (2000) (*Gerawan I*) (George, C.J., dissenting). A healthy and productive agricultural economy is necessary to

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[3] California Department of Food and Agriculture, *2002 Resource Directory*, at 28, *available at* http://www.cdfa.ca.gov/card/pdfs/Statreview.pdf (last visited Aug. 17, 2004).

[4] California produces 99 percent or more of these commodities. *2002 Resource Directory*, *supra*, at 28.

[5] *Id.*

[6] *See* Economic Research Service, U.S.D.A., State Fact Sheets, United States Summary, *at* http://www.ers.usda.gov/StateFacts/CA.htm (last visited Aug. 17, 2004).

[7] *2002 Resource Directory*, *supra*, at 32; The California Technology, Trade and Commerce Agency, *California's International Trade 2002*, *available at* http://www.commerce.ca.gov/ttca/pdfs/link_overview/int_trade/CAExports2002.pdf (last visited Aug. 17, 2004).

ensure that domestic farms are able to produce an adequate food supply for our own citizens. Cal. Gov't Code § 51220(a) (West 1985); *see also* J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 Mercer L. Rev. 736, 773 (1993). Maintaining a healthy agricultural economy is also necessary to preserve a way of life. The rural middle class, composed of relatively small family farmers, provides the primary support for local community businesses, schools, parks and churches. As the number of small farmers declines, rural poverty increases, and the health and vitality of rural communities decline. Floyd D. Shimomura, *A New Look At the California Marketing Act of 1937*, 5 U.C. Davis L. Rev. 190, 193 (1972); Matthew M. Harbur, *Anti-corporate, Agricultural Cooperative Laws and the Family Farm*, 4 Drake J. Agric. L. 385, 386-67 (1999).

California has extensive experience with agricultural commodity promotion programs that are analogous to the beef promotion program at issue in this action. California has authorized marketing orders to conduct agricultural commodity advertising and promotional programs since 1937, when its statutes were enacted. Cal. Food & Agric. Code §§ 58601-59293 (West 1997); 1937 Cal. Stats., ch. 404, at 1329. Through its comprehensive oversight and regulation of its agricultural sector, California has direct experience with various modes of agricultural regulation, including marketing and promotion programs. California is particularly well-situated to discuss the fundamental regulatory role played by these programs.

SUMMARY OF ARGUMENT

1. Agriculture is inherently subject to destabilizing "boom and bust" cycles. The nature of agricultural production severely limits farmers' ability to adjust supply to demand. This problem is exacerbated by the distribution of production among many small producers, each producing largely undifferentiated commodities. As a result, farmers are price takers who lack the ability to significantly impact the market. To mitigate these impacts, state and federal governments have developed programs that regulate the marketing of agricultural goods. California uses marketing programs as one of its primary methods of regulating agriculture. Generic advertising has proven to be one of the most successful means of regulating marketing and mitigating "boom and bust" cycles by increasing demand for agricultural commodities.

2. The program conducted under the Beef Act is government speech. The government may fund its own speech through money exacted through taxes, fees or assessments, regardless of whether citizens object to being compelled to contribute to the funding of the speech. The government can speak for itself or can enlist a private speaker to communicate its message. Determining whether the government itself is speaking requires a fact-based analysis of the structure of each program. In determining whether the government is communicating its own message through a private speaker, the critical consideration is whether the message communicated is the government's message. Where a program carries out the government's legitimate public policy objectives by articulating the government's programmatic message, the speech of that program is government speech.

3. The program conducted under the Beef Act is also justified because it meets the intermediate scrutiny standard applicable to commercial speech. Although the Court of Appeals applied *Central Hudson*'s intermediate scrutiny standard to the Beef Act, it did not conduct a careful analysis of applicable factors. *Central Hudson* requires a fact-intensive examination of each program, that program's purpose and its effectiveness in achieving that purpose.

ARGUMENT

A. STABILIZING AGRICULTURAL MARKETS HAS BEEN THE CONSISTENT ECONOMIC PURPOSE OF GOVERNMENT REGULATION OF AGRICULTURE, BUT THE PRIMARY MEANS HAS SHIFTED FROM CONTROLLING SUPPLY TO EXPANDING MARKETS.

The agricultural sector is naturally subject to alternating market gluts and scarcity, creating instability in an essential industry. Both at the state and federal levels, legislatures have struggled to create regulatory structures that will stabilize agriculture. Over time, agricultural commodity marketing programs have come into prominence as means to combat the "boom and bust" cycles intrinsic to agriculture by increasing demand for a product.

1. Agriculture Is Subject to Destabilizing "Boom and Bust" Cycles.

The nature of agriculture severely limits farmers' ability to respond to the laws of supply and demand,

leading to market instability and "boom and bust" pricing cycles. Looney, *supra*, at 767. Jon Lauck, *After Deregulation: Construction Agricultural Policy in the Age of "Freedom to Farm,"* 5 Drake J. Agric. L. 3, 7 (2000). Agricultural production is dependent on biological processes, such as weather conditions and pests, that cannot be controlled by the farmers. Looney, *supra*, at 767-68. Additionally, perennial crops, such as peaches and plums, must be planted years before they will be productive.[8] When prices are high, farmers will invest to meet the demand, increasing supply in the fol-lowing seasons. Eventually, this excess supply creates a market glut and drives down prices, sometimes to a level that falls below the cost of production.

This cycle is described in *Parker v. Brown*, 317 U.S. 341 (1943), where this Court considered one of California's early raisin marketing programs. The instability that was the impetus for California's marketing program began with the early successes in the raisin industry. Between 1914 and 1920, there was a "spectacular rise" in the price for raisin grapes. *Parker*, 317 U.S. at 363. In response, California farmers planted many additional acres of grapevines. With the rising supply came a reduction in the price of raisins. The price fell from a high of $235 per ton in 1921, to $40 to $60 per ton in the period 1922 to 1926. The drop in prices, however, did not result in a corresponding drop in supply. Instead, acreage continued to increase

[8] Harry M. Kaiser, *The Domestic Impacts of the Walnut Marketing Board's Marketing Programs*, NICPRE Quarterly, Vol. 8, No. 1 (2002) *available at* http://commodity.aem.cornell.edu/nicpre/newslet/vol8no1/index.htm (because of the relatively long per-iod between planting new trees and nut harvest, "harvest in any particular year is generally a function of yield, which is influenced by weather conditions and is largely unaffected by price.").

until 1926, and production reached its peak in 1938. As a result, for many years, raisins were selling at less than the cost of production. *Id.* at 363-64.

The cycle described in *Parker* is not unusual in the agricultural sector. Even where a crop is planted yearly with an eye on demand, farm production is seasonal and depends upon natural conditions, such as weather and pests. Increases in supply, in the absence of corresponding increases in demand, result in lower prices. Robert Scott, *Exported to Death: The Failure of Agricultural Deregulation*, 9 Minn. J. Global Trade 87, 90 at n.13 (2000); *see also* Jim Chen, *The American Ideology*, 48 Van. L. Rev. 809, 857 (1995) ("Increased supply suppresses the price of any given agricultural commodity. And falling prices do not increase total demand by price-inelastic food consumers."). Agricultural markets respond poorly to these conditions. Instead of adjusting supply when prices fall, farmers often maintain production levels, or even increase production to hedge against natural conditions or to compensate for the lower prices, thereby depressing prices even further. Lauck, *supra*, at 7, n.11. Advances in technology have not eliminated this problem. Modern technology has provided farmers with the ability to increase their production. But increased production increases supply, which depresses prices. *Id.* at 7; *see also* Chen, *supra*, at 846-47. "The drop in prices increases the pressure to push production even more, with resort to even more advanced technology and even greater reliance on borrowed capital." Chen, *supra*, at 847; *see also* Lauck, at 7.

The impact that these cycles have on farmers is exacerbated by the atomistic nature of the farmer. Agriculture is made up of widely disbursed producers, no one of whom is sufficiently large to have a significant effect on

the market. Looney, *supra*, at 767. In California alone, there are approximately 80,000 farms, averaging 346 acres.[9] Eighty percent of these farms are operated by an individual or a family.[10] The commodities produced by these farms are largely undifferentiated, and often perishable. At the same time, these farmers are selling to a relatively small number of middlemen. These circumstances create uneven bargaining power between the farmers and the middlemen to whom they sell, leaving farmers at the mercy of the small number of buyers. Shimomura, *supra*, at p. 194; Lauck, *supra*, at 8. As this Court has recognized, "[i]t is folly to suggest to the farmer with a carload of cattle on the market to 'take them home' or to 'haul back his load of wheat' or other commodity." *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 840 (1977) (White, J., dissenting) (quoting 59 Cong. Rec. 7856 (1920)). As a result, farmers are price takers, not price makers. They receive lower prices than they would if bargaining power were more equal. Lauck, *supra*, at 8; *see also* Olan D. Forker & Ronald W. Ward, Commodity Advertising: The Economics and Measurement of Generic Programs 7 (1993). At least one commentator

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[9] National Agricultural Statistics Service, 2002 Census of Agriculture, State Profile, California, *available at* http://www.nass.usda.gov/census/census02/profiles/ca/cp99006.PDF (last visited Aug. 17, 2004).

[10] National Agricultural Statistics Service, 2002 Census of Agriculture, California State Level Data, Table 58, *available at* http://www.nass.usda.gov/census/census02/volume1/ca/st06_1_058_058.pdf (last visited Aug. 17, 2004). Nationally, 90 percent of farms are owned by an individual or a family. USDA, 2002 News Release, National Agricultural Statistics Services, USDA Releases 2002 Census of Agriculture, *available at* http://www.usda.gov/nass/events/news/consusjune3release.htm (last visited Aug. 17, 2004).

has theorized that, in light of this unequal bargaining power, "[i]t is only through concerted marketing efforts that the state's independent farmers will be able to preserve a role for the small but efficient farming unit within California agriculture." Shimomura, *supra*, at 195.

This combination of factors creates unique regulatory problems. One legislative response to these problems was to create marketing programs designed to mitigate the effects of the "boom and bust" cycles.

2. Promotional Programs Regulate Agriculture and Minimize "Boom and Bust" Cycles by Increasing Demand for Agricultural Commodities.

The Beef Act at issue in this case is one of many federal programs designed to aid farmers through a generic marketing and promotion program funded by user fees. While California's programs contain features that are different from the Beef Act, California relies on these programs as a primary means of regulating agriculture.

These programs grew out of the chaotic conditions in California agriculture in the early twentieth century. *Gerawan Farming, Inc. v. Kawamura*, 33 Cal. 4th 1, 7 (2004) (*Gerawan II*). Small growers were competing in unstable and fluctuating markets, struggling to sell their products at a price that would cover at least their production costs. Shimomura, *supra*, at 197. This unregulated scramble gave rise to destructive trade practices. Because the grower that reached the market first received the best price, growers would ship unripe produce to market, flooding markets with produce of marginal quality. To make the produce more attractive, some farmers would

even engage in deceptive packaging, such as placing higher quality produce over inferior produce, using improper sampling, and false grading. *Gerawan II*, 33 Cal. 4th at 7; Shimomura, *supra* at 197. These practices only injured the market in the long run, reducing consumer acceptance of California produce. Shimomura, *supra*, at 197.

Many farmers responded to these conditions by forming cooperatives, in an attempt to regulate the quality and volume of the agricultural commodities that were marketed. While these cooperatives provided some stability, they were hampered by their inability to regulate all producers of a particular commodity. The minority that refused to join undermined the cooperative effort, while taking advantage of the increased prices resulting from those efforts. *Id.* at 197; *see also Agricultural Prorate Comm'n v. Superior Court*, 5 Cal.2d 550, 574 (1936) (voluntary volume controls on lemons undermined because a minority of growers refused to cooperate).

The Great Depression of 1929 devastated the state's already weakened agricultural economy. Demand for California products dropped dramatically, while the supply continued unabated. Shimomura, *supra*, at 198. In the three years from 1929 to 1932, prices for farm commodities fell by 56 percent, and net farm income fell by 70 percent.[11]

Recognizing that governmental intervention was necessary to stabilize agriculture, the California Legislature

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[11] John M. Crespi, *Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles*, at 6, *available at* http://commodity.aem.cornell.edu/nicpre/bulletins/rb0104.pdf (last visited Aug. 17, 2004).

passed the California Marketing Act of 1937 (CMA). Cal. Food & Agric. Code §§ 58601-59293 (West 1997); 1937 Cal Stats., ch. 404, at 1329. The CMA authorized the Secretary of the California Department of Food and Agriculture to enter into marketing agreements with farmers and distributors of farm products. The California Legislature provided that these marketing agreements can contain a wide range of regulations, including volume, grade, size and quality controls. Marketing orders can also be used to establish surplus pools. 1937 Cal. Stats., ch. 404, at 1334-35, § 1300.14(b)(2)-(6); Cal. Food & Agric. Code §§ 58881-58896 (West 1997) (listing provisions that may be contained in marketing orders). From its inception, the CMA also provided for "the establishment of plans for advertising and sales promotion to create new or larger markets for agricultural commodities grown in the State of California." 1937 Cal. Stats., ch 404, at 1335, § 1300.14(b)(7); *see also Gerawan II*, 33 Cal. 4th at 8. "These programs were rooted in the considered legislative judgment that government intervention in agricultural markets was necessary to preserve the agricultural industry." *Gerawan II*, 33 Cal. 4th at 7.

Since the 1930s, volume controls have become less favored, in part because legislatures perceive that supply controls harm consumers. Hoy F. Carman et al., *Marketing California's Agricultural Production*, *in* CALIFORNIA AGRICULTURE: DIMENSIONS AND ISSUES 115-16 (Jerry Siebert ed., 2004). In contrast, generic promotion and advertising for agricultural commodities have come into prominence as a way of approaching the supply-demand problem by increasing demand rather than by limiting supply. There are currently 25 marketing orders and 2 marketing agreements established under the CMA. The California Legislature

has also created 3 "councils" and 20 "commissions" to regulate the marketing of agricultural commodities.[12] Although the councils and commissions were not created under the CMA, they are an extension of the CMA's policy of instituting industry specific regulation, tailored to meet the needs of that industry. The components of each of these programs varies with the needs of the industry. Many of these programs include advertising and promotion.[13] Some have embedded quality control provisions.[14] Others are limited to conducting research.[15] All of these

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[12] California Department of Food and Agriculture, Marketing Branch, *How Many Marketing Programs Are There . . . And Who Pays for Them?*, *available at* http://www.cdfa.ca.gov/mkt/mkt/mktb-2.html (last visited Aug. 17, 2004).

[13] *See, e.g.*, Marketing Order for Research, Education and Promotion of Market Milk and Dairy Products in California, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/marketmilk.pdf (last visited Aug. 17, 2004).

[14] *See, e.g.*, California Canteloupe Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/marketmilk.pdf (last visited Aug. 17, 2004); Marketing Order for Dried Figs, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/marketmilk.pdf (last visited Aug. 17, 2004); California Pear Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/pear.pdf (last visited Aug. 17, 2004); and California Plum Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/plum.pdf (last visited Aug. 17, 2004).

[15] California currently has 7 research only programs. Alfalfa Seed Production Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/alfalfaseed.pdf (last visited Aug. 17, 2004); California Celery Research Advisory Board, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/celery.pdf (last visited Aug. 17, 2004); California Citrus Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/ctrus.pdf (last visited Aug. 17, 2004); California Lettuce Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/Lettuce.PDF (last visited Aug. 17, 2004); California Melon Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/melons.pdf (last visited Aug. 17, 2004); California Potato Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/potato.pdf (last visited Aug. 17, 2004); California Rice

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programs are designed to stabilize and expand the markets for California agricultural products.

Through these programs, both small and large producers have been able to pool their resources to reach consumers and increase demand for these commodities. Forker & Ward, *supra*, at 7. Studies of these programs show that they are cost effective.[16] The creation of a mechanism whereby farmers can join together in marketing their product is particularly important today, when agricultural products must compete against highly advertised brands, widely promoted by giant conglomerates. The visibility that can be achieved through promotion programs is more important than ever in stabilizing the balance between supply and demand for agricultural products. *See* Daniel I. Padberg & Charles Hall, *The Economic Rationale for Marketing Orders*, 5 San Joaquin Agric. L. Rev. 73, 82 (1995).

Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/rice.pdf (last visited Aug. 17, 2004); California Grape Rootstock Commission, Cal. Food & Agric. Code §§ 74701-74796 (West 1997); California Pepper Commission, Cal. Food & Agric. Code §§ 77201-77376 (West 1997).

[16] For example, a November 1997 study of the California Table Grape Commission's program conservatively estimates that it produces net industry returns of $5 for every $1 spent, and indicates that the benefits may be even higher. Julian M. Alston et al., *The California Table Grape Commission's Promotion Program: An Evaluation*, at 77 (University of California, Giannini Monograph, No. 43, 1997). Studies of the returns on programs for California avocados, prunes, almonds, eggs, raisins, and walnuts have found that advertising and promotion programs increased demand for these commodities and the returns from these programs "exceeded costs by a significant margin." Carman, *supra*, at 114.

B. THE BEEF ACT PROGRAM IS GOVERNMENT SPEECH THAT DOES NOT VIOLATE THE FIRST AMENDMENT.

The Eighth Circuit below rejected the argument that the Beef Act's program is permissible because it is government speech. Appendix to Petition for Writ of Certiorari (Pet. App.) 17a-19a. The *Livestock Marketing* court concluded that the government speech doctrine applies only in challenges to the government's speech, and does not apply to challenges to the government's authority to compel the funding of particular speech programs. *Id.* There is no basis for this conclusion. Instead, this Court's decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), indicates that the government speech doctrine is applicable to compelled speech claims.

In *Southworth*, this Court addressed a challenge to a university's mandatory student fee, which was used to fund political and ideological speech. Had the speech been that of the university, it would have been government speech, and permissible as long as there were sufficient political controls to ensure responsible government action. *Southworth*, 529 U.S. at 229. As the Court explained:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other

> expression to advocate and defend its own policies . . . .

Southworth, 529 U.S. at 229. Similarly, here, the generic advertising conducted under the Beef Act is permissible because it is government speech.

In determining whether the government is speaking through a program, the critical consideration is whether the program conveys the government's own message. *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 541-42 (2001). The government's ability to control the content of its own message does not depend upon whether the money used to fund the speech is collected through taxes or instead through other, more targeted exactions, such as tuition in a university setting. *Southworth*, 529 U.S. at 229. Where a program is found to be government speech, that program is permissible as long as the "political controls to ensure responsible government action" are "sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." *Southworth*, 529 U.S. at 229.

There are two ways in which a generic marketing program can be considered speech of the government. First, where the speaker is a governmental entity, its speech is government speech. *Cf. Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990) ("With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process"). A government entity may engage in any speech that is within the scope of its statutory authority. *Id.* at 14; *cf. Southworth*, 529 U.S. 229 (if the challenged speech were that of the university, the only

limitation would be the question of whether there were sufficient political controls). Often, it is not difficult to determine the speaker is a governmental entity. For example, where the Secretary of Agriculture advocates a government program, her speech is government speech. In light of the myriad entities involved in California's marketing programs, the question has sometimes been made to appear difficult. While the language and details vary, however, all these boards and commissions generally, and California's specifically, are public institutions. California's Marketing Orders, issued under the CMA, are advisory boards to the Secretary of Food and Agriculture, with the Secretary himself being the speaker. Cal. Food & Agric. Code §§ 58601-59293 (West 1997). California's agricultural commissions are expressly created by the Legislature as state institutions. *See, e.g.*, Cal. Food & Agric. Code §§ 65500-65675 (West 1997) (California Table Grape Commission); Cal. Food & Agric. Code §§ 67021-67143 (West 1997) (California Avocado Commission).

Given the diversity of forms nationwide, where there is any question of whether the entity that is speaking is a government entity, courts must conduct an in-depth fact-based analysis of the structure of each program to determine whether its speech is that of government. *See Keller*, 496 U.S. at 11 (considering the California State Bar's sources of funding, its membership, and whether it exercises governmental power, in determining whether California State Bar is a government entity).

Second, the government may enlist a private speaker to communicate its message. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it

enlists private entities to convey its own message.") In determining whether the government is communicating its own message through a private speaker, the central consideration is whether the chosen speaker conveys the government's own message, or instead facilitates private speech. *See Velasquez*, 531 U.S. at 542. Accordingly, where the government institutes a program to carry out its legitimate public policy objectives and to articulate its own programmatic message, that program is government speech.

Rather than examining the nature of the entity that is speaking, or whether the program is designed to achieve the government's own policy objectives, the circuit courts that have addressed the applicability of the government speech doctrine to generic marketing programs focused on the wrong aspects of the programs to determine whether they are government. These courts of appeals looked at the level of bureaucratic control that the United States Secretary of Agriculture exercises over the programs to determine whether the programs' speech is government speech. *Cochran v. Veneman*, 359 F.3d 263, 273-74 (3d Cir. 2004); *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 162 (6th Cir. 2003); *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 431 (5th Cir. 2004). This focus exalts the very worst aspect of government – bureaucracy – and ignores the public policy purpose behind these programs.

Whether a program is government speech does not turn on the level of bureaucratic control exercised over a program, but instead turns on whether the program delivers the government's message. For example, in *Rust*, the government used private physicians to transmit specific information pertaining to its own program regarding family planning. *Rust v. Sullivan*, 500 U.S. 173, 195 (1991). The

Court found that this program was permissible, and later explained that the basis for this finding was that the government can make viewpoint-based funding decisions when it is using private speakers to transmit its own programmatic message. *Velasquez*, 531 U.S. at 541. In upholding the government's program, the *Rust* Court did not examine the level of bureaucratic controls placed on the speech, or require the exact words used by a physician to be pre-approved by a government official. *See Rust*, 500 U.S. at 179-181 (describing program). Instead, it was sufficient that the government dictated a programmatic message, and speakers were used to transmit that message. *Velasquez*, 531 U.S. at 548.

In contrast, in *Velasquez*, this Court rejected the contention that restrictions on the speech of legal aid lawyers could be justified by the government speech doctrine, because "there was no programmatic message of the kind recognized in *Rust*" that "sufficed to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Velasquez*, 531 U.S. at 548.

The Beef Act is designed to transmit the government's programmatic message. While the structures of these programs vary widely, the common thread is that they are mandated by federal or state legislatures to ensure a stable agricultural economy by maintaining and expanding markets for agricultural goods. *See, e.g.*, Cal. Food & Agric. Code § 58651 (West 1997).

For example, the California Legislature in enacting the CMA found that economic waste of agricultural commodities occasioned by poor marketing practices "jeopardiz[ed] the future continued production of adequate supplies of food" and other farm products. Cal. Food &

Agric. Code § 58651 (West 1997). That waste also yielded low producer income and prevented agricultural sectors from "contributing their fair share to the support of necessary governmental and educational functions" and "tending to increase unfairly the tax burdens of other citizens of this state." *Id.* Accordingly, the California Legislature authorized "the establishment of plans for advertising and sales promotion to maintain present markets or to create new or larger markets" for commodities grown in California. Cal. Food & Agric. Code § 58889 (West 1997).

These are legitimate public policies. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493-494 (1997) (Souter, J., dissenting); *see also Gerawan II*, 33 Cal. 4th at 22-23. The government is free to articulate its own programmatic message to achieve these ends, regardless of whether the entity that is actually speaking is a government entity or is instead a private speaker transmitting the government's message. As long as the program conveys the government programmatic message in a manner directed to meeting the government's public policy goals, the generic advertising, conducted pursuant to the governmental mandate, is government speech.

C. THE BEEF ACT IS CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY STANDARD APPLICABLE TO COMMERCIAL SPEECH.

The generic advertising conducted under the Beef Act is also constitutional under the intermediate scrutiny applicable to commercial speech. Although the Eighth Circuit below applied intermediate scrutiny standard under *Central Hudson Gas & Electric Corporation v.*

Public Service Commission, 447 U.S. 557 (1980) to the Beef Act, it did so in a cursory manner that did not consider the merits of the Beef Act in light of the needs of the regulated industry. Pet. App. 24a-28a. Instead of examining the purpose of the Beef Act and its application to its industry, the Court of Appeals relied on *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) for the proposition that, in the absence of a larger regulatory scheme, there is an insufficient state interest to support these programs. Pet. App. 26a-27a. In doing so, the Eighth Circuit failed to fully consider factors that are relevant to a *Central Hudson* analysis.

Contrary to the conclusory analysis conducted by the Court of Appeals, the application of the *Central Hudson* test requires a careful analysis of each program. The California Supreme Court has recently considered the application of the *Central Hudson* test to a generic marketing program and provides a sound analysis of how the *Central Hudson* factors apply in this context.[17] In *Gerawan II*, the California Supreme Court considered the application of the *Central Hudson* test to California's Plum Marketing Program, in light of the unique position agriculture holds in

[17] The California Supreme Court had first addressed this issue in *Gerawan I*. In *Gerawan I*, the Court held that, in the context of compelled funding for generic marketing programs, the California Constitution provides greater protection for free speech than does the United States Constitution. *Gerawan I*, 24 Cal. 4th at 517. In *Gerawan II*, the California Supreme Court found that the plum marketing program at issue was ancillary to a broader regulatory scheme, and therefore did not violate the First Amendment of the United States Constitution. *Gerawan II*, 33 Cal. 4th at 20. The court also found that the *Central Hudson* test provides the appropriate framework under the California Constitution. *Gerawan II*, 33 Cal. 4th at 22.

the state and national economics. *Gerawan II*, 33 Cal.4th at 22-24. In so doing, the court did not question that California's "objective of maintaining and expanding markets for agricultural products, thereby ensuring the viability of California agriculture" is a substantial objective. *Gerawan II*, 33 Cal.4th at 22-23. The court recognized that to meet this prong, the State cannot merely rely on legislative declarations, but instead must show that these programs' statutory goals "are in fact the goals of the marketing program at issue in this case," which could only be addressed through an examination of the facts particular to the program. Similarly the remaining two prongs of *Central Hudson*[18] require development of facts relevant to whether the generic advertising conducted by the program is an efficacious means of improving the sale of agricultural products, and whether the scope of the program is "in proportion to the interest served. . . . " *Gerawan II*, 33 Cal. 4th at 23. The court in *Gerawan II* therefore remanded the case to the trial court for the development of an evidentiary record and careful examination of these issues. *Gerawan II*, 33 Cal. 4th at 24. The reasoning of the court in *Gerawan II* was sound, and provides an appropriate framework when applying *Central Hudson* to a generic marketing program.

As in California, there are myriad variations of agricultural marketing and promotion programs existing

[18] The second and third prongs of the *Central Hudson* test are whether the regulation directly advances the governmental interests asserted, and whether the regulation is not more extensive than necessary to serve the government's interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

at the federal level and in almost every state, all for varied commodities with diverging marketing problems. These programs meet their legislative mandates differently. Each of these programs has a structure that is specific to the commodity for which it was designed. *Central Hudson* requires a fact-intensive examination of each program, that program's purpose, and its effectiveness in achieving that purpose.

CONCLUSION

Generic marketing programs, analogous to the Beef Act, are one of California's primary means of regulating agriculture to avoid "boom and bust" cycles. In California, these programs have myriad forms. In each case, determining whether the entity conducting the program is a government entity requires an examination of that particular program. Similarly, application of the *Central Hudson* test to these programs requires a fact-intensive examination of each program, that program's purpose and its effectiveness in achieving that purpose.

Here, the Eighth Circuit failed to apply a fact-intensive analysis to the Beef Act. The Beef Act is constitutional under both the government speech doctrine and the *Central Hudson* test. Accordingly, the judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

BILL LOCKYER, Attorney General of
the State of California
RICHARD M. FRANK
Chief Deputy Attorney General
MARY E. HACKENBRACHT
Senior Assistant Attorney General
LINDA L. BERG*
Deputy Attorney General
P.O. Box 944255
1300 I Street
Sacramento, CA 94244-2550
Telephone: (916) 327-5484
**Counsel of Record*

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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE CALIFORNIA AGRICULTURAL ISSUES FORUM SUPPORTING PETITIONERS

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
TODD ZUBLER
BRIAN M. BOYNTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

QUESTION PRESENTED

Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder are unconstitutional.

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STATEMENT OF INTEREST[1]

The California Agricultural Issues Forum ("the Forum") is a nonprofit mutual benefit corporation whose members are entities established under state or federal laws to collect mandatory assessments and to use those assessments to engage in research and promotional activities relating to particular agricultural commodities. The Forum is thus intimately familiar with the workings of programs like that at issue in this case and has a substantial interest in the continued operation and success of those programs.

SUMMARY OF ARGUMENT

Few issues of public policy have plagued national and state government as profoundly or as consistently as low farm prices.[2] Since at least the 1930s, Congress and the States have attempted innumerable remedies, from production restrictions, to antitrust exemptions, to price supports. Fields that were already planted have been "plowed up" and millions of newborn pigs and hundreds of thousands of sows killed to drive up prices; taxpayers have shouldered the cost of hundreds of billions of dollars of farm subsidies; and the Government has taken the extraordinary step of paying farmers not to farm.

As discussed more fully below, the problem of low farm prices has persisted in part because most agricultural commodities, unlike many other goods, come from a very large number of relatively small producers and are undifferentiated between producers. In 2002, for example, there were more than two million farms in the United States, each with

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Forum, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom To Farm,"* 5 Drake J. Agric. L. 3, 15 (2000) (In the 1960 presidential election, Senator John Kennedy declared that low farm prices were "our no. 1 . . . domestic problem.").

average sales of less than $100,000.[3] As a result—unlike the IBMs or GMs of the world—the average avocado, cherry, or grape farmer cannot possibly engage in the costly research and promotion necessary to increase overall consumer demand (and thus price) for his or her product. Experience and economic theory show, moreover, that *voluntary* efforts to band together to do so are destined to fail. The average avocado farmer, for example, has no incentive to advertise individually, or to join with other farmers to do so, when the benefit of his or her expenditure or contribution will be shared over the thousands of other growers—many of whom may have themselves opted not to contribute.

Mandatory agricultural research and promotion programs, like that at issue in this case, represent a singular success in addressing this "collective action problem" and the plight of small farms throughout the country. There are more than one hundred existing federal and state mandatory commodity research and promotion programs, which undertake, among other things, health and agriculture research, foreign market access initiatives, consumer education, and generic advertising—all designed to increase demand or to improve production for particular agricultural commodities. And they have had extraordinary success in doing so. Indeed, in some cases, the return on investment to each participant is as high as $26 for every dollar paid. No other farm policy has come close to achieving this level of success.

The Eighth Circuit's decision jeopardizes these programs and the countless farm-related jobs that depend on the market demand they generate. Perhaps most disturbingly, the approach adopted by the Eighth Circuit would impose on Congress (and, presumably, state legislatures) a single, judicially defined recipe for agricultural promotion: If Congress wants to expand demand for an agricultural commodity by imposing mandatory assessments on growers that

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[3] *See 2002 Census of Agriculture*, vol. 1, ch. 1, tbl. 1, *available at* http://www.nass.usda.gov/census/census02/volume1/us/st99_1_002_002.pdf (last visited Aug. 20, 2004).

are then used for advertising (along with other demand-increasing activities), it must first implement a "broader collective enterprise" in which growers' "freedom to act independently" is "constrained by [a] regulatory scheme," as in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). *See United States* v. *United Foods*, 533 U.S. 405, 412 (2001) (quoting *Wileman*, 521 U.S. at 469). Under the reasoning of the Court of Appeals, any other program of this sort is *per se* unconstitutional. Nothing in the First Amendment or this Court's precedents compels this remarkable conclusion.

First, contrary to the Court of Appeals' conclusion, the First Amendment does not even apply to the mandatory funding of speech by a government-established entity that delivers a message defined by the government.

Second, even if the First Amendment applies, it does not impose any such *per se* rule. Rather, because mandatory commodity promotion programs bar no speech, but simply provide additional information to consumers; do not compel any speech, but only the payment of money; and do not convey an ideological message, but only commercial advertisements, the most stringent level of scrutiny that can possibly apply is intermediate scrutiny. Given the opportunity, the vast majority of federal and state commodity research and promotion programs will be able to show that they effectively further an important government interest in supporting agricultural industries and helping to overcome the collective action problem, and that they do so in a narrowly tailored manner.

Finally, many mandatory commodity programs are also constitutional under the "germaneness" test articulated in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), because unlike the stand-alone advertising program at issue in *United Foods*, they use advertising as part of a broader effort to expand demand—including through health and agricultural research and foreign market access efforts.

Regardless of how any particular program might fare if subjected to the proper constitutional scrutiny, the Court of

Appeals plainly erred in setting aside an important federal statute solely because it concluded that the program was not accompanied by a collectivization of the industry.

ARGUMENT

I. MANDATORY CONTRIBUTIONS FOR COMMODITY PROMOTION PROGRAMS DO NOT IMPLICATE PRODUCERS' FIRST AMENDMENT RIGHTS BECAUSE THE SPEECH FUNDED IS THAT OF THE GOVERNMENT.

A. The Eighth Circuit's determination that the government-speech doctrine does not apply in a case involving compelled funding of speech (*see* Pet. App. 17a-18a) should be rejected. This Court has recognized that it is "inevitable that funds raised by the government will be spent for speech and other expression" and that the government may pay for that speech with "taxes or other exactions binding on protesting parties." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000). Thus, the Court has made clear that citizens compelled to fund government speech have no right under the First Amendment to object to funding that speech. *See Keller* v. *State Bar of Cal.*, 496 U.S. 1, 12-13 (1990).[4] The advertising of most commodity promotion programs is government speech because the boards that run the ads are instrumentalities of the government under this Court's precedent and the messages they deliver are defined by Congress and the state legislatures.

This Court's decision in *Lebron* v. *National Railroad Passenger Corp.* makes clear that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent

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[4] The Court of Appeals relied on *Southworth* in holding that the government-speech doctrine does not apply to a case involving the mandatory funding of speech. *See* Pet. App. 17a-18a. But *Southworth* compels exactly the opposite conclusion. *Southworth*, too, involved the mandatory funding of speech, and although the government-speech doctrine did not apply there, the Court said it did not only because "[t]he University ha[d] disclaimed that the speech is its own." 529 U.S. at 229.

authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." 513 U.S. 374, 400 (1995). Here, the Court of Appeals concluded that *Lebron* was inapplicable because Amtrak, which was resisting a holding that its billboards were public fora, "argued that it was *not* part of the government," whereas "in a government speech case the defendant typically argues that it *is* part of the government and therefore immune from content-related First Amendment scrutiny." Pet. App. 18a n.5. The court did not explain, however, why this difference matters, unless the governing rule is that an entity's governmental status must always be resolved against the entity in favor of a First Amendment challenge. But that cannot be the law. To the contrary, if an entity is a part of the government that cannot make content-based distinctions when it creates a public forum for private speech, then surely that same entity remains part of the government when it is itself the speaker.[5]

In the present context, moreover, not only is the speaker a government-created entity, with government-appointed members, but the message that it conveys is also defined by the government. The Beef Act, for example, like most commodity promotion programs, defines the speech at issue: it must be about beef—speech about politics, social issues, and anything else is not authorized—and it must convey a specific message about beef, namely, that consumers should buy more beef. *See* 7 U.S.C. §§ 2902(13), 2904(10). A commodity promotion board's speech, in other words, is fundamentally different from the political and ideological speech of the State Bar in *Keller*, which was not specified by the government and which this Court held lawyers could not be compelled to subsidize. *See* 496 U.S. at 13-16. For these

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[5] The fact that members of the Beef Board are nominated by state cattle associations before being appointed by the Secretary of Agriculture does not change this conclusion. Indeed, the same was true in *Lebron*, where the President was required to make most of his appointments from lists submitted by various groups. *See* 513 U.S. at 385.

reasons, here, unlike in *Keller*, there is little doubt that the government is "accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. As with all other government speech, those who disagree with the message can blame Congress.

B. Day-to-day oversight of a commodity program by another government agency is not required for the government-speech doctrine to apply. The lower courts have disagreed about whether the Secretary of Agriculture performs any meaningful oversight of the Beef Program and have given this question significant weight in their determinations whether the Beef Program constitutes government speech. *Compare Livestock Mktg. Ass'n* v. *USDA*, 207 F. Supp. 2d 992, 1005-1006 (D.S.D. 2002), *with Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1137-1138 (D. Mont. 2002). That inquiry, however, is wholly beside the point.

If an entity like the Beef Board is itself a governmental entity that is required to deliver a government-defined message, then its speech is necessarily government speech, and oversight by a different government agency is irrelevant. This Court did not ask in *Lebron*, for example, whether the government-appointed directors were subject to day-to-day oversight by some other government official.[6] Any other approach would force courts to make difficult, arbitrary determinations regarding precisely how much government oversight is sufficient for a particular program. For example, is attendance by a government representative at most but not all board meetings sufficient? If the government representative attends but plays no active role, is the defense still viable? This Court should avoid opening the door for further litigation wrestling with minutiae of this nature by holding that the advertising conducted by commodity promotion boards pursuant to a specific mandate by Con-

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[6] To the contrary, the Court recognized that "the directors of Amtrak, unlike commissioners of independent regulatory agencies, are not, by the explicit terms of the statute, removeable by the President for cause, and are not impeachable by Congress." *Lebron*, 513 U.S. at 398.

gress or a State is government speech that does not implicate producers' First Amendment rights.

II. A MANDATORY COMMODITY PROMOTION PROGRAM IS CONSTITUTIONAL IF IT SATISFIES INTERMEDIATE SCRUTINY.

A. It is long settled that a law is not unconstitutional merely because it implicates First Amendment rights. *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Rather, before a court may declare a law unconstitutional, it must consider whether the law serves a sufficiently important governmental interest and does so with sufficient precision. Even content-based restrictions on core political speech and prior restraints on speech can survive constitutional scrutiny in some circumstances. *See Burson* v. *Freeman*, 504 U.S. 191, 211 (1992); *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). Thus, even if a particular commodity promotion program implicates the First Amendment—because it does not involve government speech and is not mere "economic regulation" under the Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474-475 (1997)—the program must be upheld if it survives the applicable constitutional scrutiny.

Rather than apply this well-established framework to the Beef Program, the Court of Appeals held that it was not required "to engage in such a line-drawing exercise" because this Court had already decided in *United Foods* that any mandatory commodity promotion program that is not part of a broader regulatory scheme is *per se* unconstitutional. *See* Pet. App. 26a. *United Foods*, of course, holds no such thing. To the contrary, the Court was unmistakably clear in stating "we . . . do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test." 533 U.S. at 410. The notion that the Court nonetheless went on to decide this issue, not only with respect to the mushroom program, but also with respect to every other commodity promotion program—and did so in the context of reviewing whether the district court had

properly granted summary judgment in the Government's *favor*—is unfounded.

B. A law requiring producers of a commodity to fund generic advertising for that commodity is subject to, at most, intermediate scrutiny because such a law only minimally impinges on the First Amendment rights of producers—if it does so at all. Six members of this Court have already indicated that a mandatory commodity promotion program is constitutional if it passes the intermediate scrutiny test established under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). In *Wileman*, Justice Souter, Chief Justice Rehnquist, and Justice Scalia said (in dissent) that they would have applied intermediate scrutiny to commodity promotion programs. *See* 521 U.S. at 492-493 (Souter, J., dissenting). And in *United Foods*, Justices Breyer, O'Connor, and Ginsburg indicated that if the mushroom program were subject to First Amendment scrutiny at all, they would apply only intermediate scrutiny and uphold the program. *See* 533 U.S. at 429 (Breyer, J., dissenting).

To be sure, in neither *Wileman* nor *United Foods* did a majority apply intermediate scrutiny, but in neither case was it necessary for the Court to do so. In *Wileman*, the Court held that the tree-fruit marketing program did not even implicate the First Amendment. The Court questioned in a footnote why the Court of Appeals in that case had started its analysis with *Central Hudson* rather than "apply *Abood*'s 'germaneness' test," *Wileman*, 521 U.S. at 474 n.18, but the Court never stated that a program that passed the higher *Central Hudson* standard would nonetheless be unconstitutional. Similarly, the Court in *United Foods* had no reason to address whether intermediate scrutiny was applicable. *United Foods* principally addressed and rejected the Government's contention that the mushroom program was constitutional as economic regulation under the Court's decision in *Wileman*. *See* 533 U.S. at 411-413. The Court expressly noted that the Government did "not rely upon *Central Hudson* to challenge the Court of Appeals' decision,"

533 U.S. at 410, and the Court therefore never addressed whether a commodity promotion program could be constitutional based on the fact that it serves important governmental purposes, independent of any connection to a broader regulatory scheme. Neither case, therefore, forecloses the application of intermediate scrutiny. *See Waters* v. *Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion of O'Connor, J.); *Webster* v. *Fall*, 266 U.S. 507, 510 (1925).

In any event, because mandatory commodity promotion programs are particularly unlikely to impose significant burdens on free speech, no standard more demanding than intermediate scrutiny should apply.

First, commodity promotion programs involve the compelled funding of only nonpolitical, nonideological, commercial speech. Whatever the level of scrutiny applicable to a *restriction* on commercial speech that deprives consumers of truthful, nonmisleading information, *see 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501-504 (1996) (plurality opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment), this Court's precedents are clear that a regulation of commercial speech that results in *more*, rather than less, speech implicates First Amendment rights to only a limited degree. As a plurality of the Court noted in *44 Liquormart*, the principal reason commercial speech even warrants First Amendment protection is because *consumers* have an interest in *receiving* product information. *See id.* at 496 (plurality opinion of Stevens, Kennedy, Souter, Ginsburg, JJ.). A law that provides consumers with more information therefore should be analyzed differently than a law that limits the flow of information.

In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), for example, the Court applied highly deferential review in upholding a requirement that an attorney's advertisement disclose that clients must pay costs in contingent fee cases because it was "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

Although the State's interest in that case focused on preventing consumer deception, *see United Foods*, 533 U.S. at 416, the Court made clear that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [a person's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." 471 U.S. at 651.

Second, laws that regulate the payment of money, even if used for speech, tread less heavily on free-speech rights than laws that regulate speech directly. The payment of money simply is not the equivalent of speech. As the Court recently explained in upholding a ban on corporate campaign contributions, "restrictions on political contributions have been treated as merely marginal speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003) (internal quotation omitted). For this reason, the Court has held that campaign contribution limits are not subject to the "strong presumption against constitutionality of the sort often thought to accompany the words 'strict scrutiny.'" *McConnell* v. *FEC*, 124 S. Ct. 619, 656 (2003).

By the same token, laws that compel (rather than limit) the funding of speech implicate First Amendment rights to a lesser degree than laws that actually compel speech itself. Indeed, this Court's cases make clear that laws compelling funding of speech do not trigger exacting scrutiny. In *Abood*, for example, before even reaching the germaneness inquiry, the Court invoked a relaxed form of scrutiny—citing "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress"—in reaffirming that an employee may be compelled to pay fees to a union even if the employee has ideological objections to the union's collective bargaining ac-

tivities. 431 U.S. at 222;[7] *see also Lathrop* v. *Donohue*, 367 U.S. 820, 843 (1961) (Wisconsin "might reasonably believe" that compelled payment of bar dues by all lawyers in the State served "legitimate interests in raising the quality of professional services"). If an employee can be compelled to pay for ideological speech relating to collective bargaining in order serve the important governmental interest in labor policy, then surely a farmer can be compelled to pay for commercial speech in order to serve the equally important governmental interest in agricultural policy.

C. The Court of Appeals erred in concluding that *United Foods* prevented it from undertaking an independent determination whether the Beef Act can be sustained under intermediate scrutiny. Because the Eighth Circuit has not considered the application of intermediate scrutiny, this Court, rather than address the issue in the first instance, should reverse the decision of the Court of Appeals and remand the case for application of that test. *See Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) (remanding for application of the proper level of scrutiny).

III. MOST MANDATORY COMMODITY PROMOTION PROGRAMS WILL SURVIVE INTERMEDIATE SCRUTINY.

Under intermediate scrutiny, a law will be upheld against constitutional challenge if "it furthers an important or substantial governmental interest," "the governmental interest is unrelated to the suppression of free expression," and if the restriction "is no greater than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994) (internal quotation omitted).

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[7] The "germaneness" inquiry of *Abood* and its progeny is used to determine whether activities outside of core collective bargaining activities may be funded with mandatory dues. *See, e.g., Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). The separate determination, initially undertaken by the Court in *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), and acknowledged in *Abood*, that compelled funding of collective bargaining is constitutionally justified, entailed an application of a relaxed form of intermediate scrutiny. *See Abood*, 431 U.S. at 222.

"To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Id.*; *see also Board of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989).

Whether a particular commodity promotion program survives First Amendment scrutiny is a fact-intensive inquiry that must be made on a case-by-case basis. *See Turner Broad.*, 512 U.S. at 664-665. But most, if not all, mandatory commodity promotion programs—even if they involve only or primarily generic advertising—should pass this test. Such programs further an important governmental interest in helping to sustain important agricultural industries and overcoming the structural impediments that prevent farmers from engaging in significant demand-expanding activity—either individually or through voluntary collective action. Indeed, in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), the Court of Appeals for the Third Circuit concluded that the Beef Program survived even strict scrutiny precisely because supporting the beef industry is a compelling governmental purpose, the Program is ideologically neutral, and the mandatory nature of the Program is necessary to combat the free-rider problem. *See id.* at 1133-1137.

More recently, in a thorough and well-reasoned opinion, the California Supreme Court held that, under the State Constitution (which is generally more protective of free-speech rights than the United States Constitution), commodity promotion programs are subject to only intermediate scrutiny. *See Gerawan Farming, Inc.* v. *Kawamura*, 90 P.3d 1179, 1192 (Cal. 2004). In considering the application of intermediate scrutiny, the court (1) held that "the objective of maintaining and expanding markets for agricultural products, thereby ensuring the viability of California agriculture, is a substantial objective," *id.* at 1193; (2) rejected the argument that "the government's interest is not substantial simply because the [California Marketing Act] has delegated the decision whether to create a marketing program in a given sector of the agricultural economy to the agricultural producers themselves," *id.*; (3) accepted the State's position that

if the generic advertising at issue is "an efficacious means of significantly improving the sale of agricultural products in this state," then the challenged program directly advances the government's interests, *id.*; and (4) rejected the plaintiff's argument that a program funded from producer assessments is always unconstitutional because it could be funded from general tax revenues, *see id.* at 1194. This Court, if it rejects the government-speech defense and addresses the application of intermediate scrutiny, should apply a similar analysis under the federal Constitution.

A. Mandatory Commodity Promotion Programs Further Substantial Governmental Interests in Supporting Agricultural Industries and Remedying Market Failures.

Agriculture is of fundamental importance to the economies of the United States and particular States. In 2002, over two million farms in the United States produced $200 billion worth of goods, and farm-related employment accounted for approximately 26 million jobs—over 15% of the total jobs in the United States.[8] For California, which has the largest agricultural production of any State in the Nation, the total amount of sales of agricultural products was well over $25 billion in 2002, there were almost 100 million acres of farmland that year, and in 2000, farm-related employment accounted for 15.1% of the State's over 19 million jobs.[9]

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[8] *See 2002 Census of Agriculture*, vol. 1, ch. 1, tbl. 1, *available at* http://ww.nass.usda.gov/census/census02/volume1/us/st99_1_002_002.pdf (last visited Aug. 20, 2004); Economic Research Service, USDA, State Fact Sheets, *available at* http://www.ers.usda.gov/StateFacts/US.HTM (last visited Aug. 20, 2004).

[9] *See 2002 Census of Agriculture*, vol. 1, ch. 2, tbl. 2, *available at* http://www.nass.usda.gov/census/census02/volume1/us/st99_2_002_002.pdf (last visited Aug. 20, 2004); Economic Research Service, USDA, State Fact Sheets, *available at* http://www.ers.usda.gov/StateFacts/CA.htm (last visited Aug. 20, 2004) (jobs total for 2001).

It is clear that given the importance of agriculture to the economy of the United States and various individual States, the governmental interest in supporting the agricultural industry is substantial. The California Supreme Court so concluded in *Gerawan Farming*, *see* 90 P.3d at 1193, and even the Justices in dissent in *Wileman* agreed that maintaining and expanding markets for covered commodities are "substantial government interests," 521 U.S. at 492 (Souter, J., dissenting). Mandatory commodity promotion programs directly advance this governmental interest in two ways: (1) increasing demand for agricultural commodities, and (2) addressing market failures that result in suboptimal spending on agricultural research and promotion.

1. Commodity Promotion Programs Maintain and Expand Agricultural Industries.

Maintaining a vibrant and stable agricultural industry is of utmost importance both to the United States and to individual States. That task, however, is not an easy one. Weather, disease, and pests—uncontrollable and unpredictable—can drastically affect crop output. Moreover, agricultural markets respond poorly to gluts in the market that depress prices. *See* Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom To Farm,"* 5 Drake J. Agric. L. 3, 5 (2000). "Instead of adjusting supply when prices sink to unsustainable levels, farmers often maintain production levels—believing that they need to operate at full-capacity in order to make up for lower prices—or increase their production." *Id.* Indeed, many farmers have turned to new technologies to increase production in an attempt to make up for lower prices. But this effort has been likened to running on a treadmill: "[G]reater production through more technology . . . compound[s] the low price problem, creating the need for even more productivity improvements." *Id.* at 5-6. Furthermore, the sheer number of farmers, their small relative size, and the perishability of

crops weaken farmers' bargaining positions.[10] The bargaining power disparity between farmers and large-scale food processors is especially pronounced. *See id.* at 8. Together, the various economic problems that plague agricultural markets and make farming a highly volatile enterprise have been called "the farm problem."[11]

Since the 1930s, the federal and state governments have responded to these market problems in a number of ways. One early legislative response was the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), which "created the authority for the regulation of production." Lauck, *supra*, at 12. The flaws of production controls, however, were immediately seen when "[s]ix million little pigs and two-hundred thousand sows were killed to boost hog prices, leaving the country horrified by the mass matricide and infanticide." *Id.* (internal quotation omitted). An alternative to production controls are government price support mechanisms such as nonrecourse loans and subsidies. *See id.* at 13-19. But of course, "direct government payments to farmers . . . cost the federal government more money" than other forms of regulation. *Id.* at 17. Indeed, between 1978 and 2002, the federal government spent in excess of $300 billion—or about 10% of the national debt in 2002—on farm subsidies.[12]

A complement (and, at times, an alternative) to government regulation of supply and government subsidization has been legislation that allows producers of a commodity to band together and fund generic advertising to stimulate *demand*. *See, e.g.*, Federal Agriculture Improvement and Re-

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[10] Olan D. Forker & Ronald W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* 7 (1993).

[11] *See* John M. Crespi, *Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles*, National Inst. for Commodity Promotion Research & Evaluation 3 (2001), *available at* http://www.aem.cornell.edu/special_programs/commodity/nicpre/bulletins/rb0104.pdf (last visited Aug. 20, 2004).

[12] Robert J. Samuelson, *A Sad Primer in Hypocrisy*, Newsweek, Feb. 11, 2002, at 49.

form Act of 1996 ("FAIR Act"), Pub. L. No. 104-127, § 501(b)(1), 110 Stat. 888 (1996). The Beef Program, for example, is expressly "designed . . . to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. § 2901(b). Similarly, California's commodity research and promotion programs are intended to "increase overall demand for [the] commodities" covered and to "avoid economic waste and maintain stable agricultural markets." Cal. Food & Agric. Code §§ 63901(e), 63901.4.

Such programs play a substantial role in today's agricultural economy. A survey conducted in the late 1990s revealed that there were at least 102 commodity programs in operation with combined budgets of nearly $700 million.[13] At present, there are 17 national federal programs that cover blueberries, beef, cotton, dairy, eggs, milk, Hass avocados, honey, lamb, mangoes, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, and watermelons.[14] For California alone, there are 48 mandatory commodity programs established under state law, including programs for California's top five agricultural products (dairy products, greenhouse/nursery products, grapes, lettuce, and cattle/calves), and 12 federal

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[13] *See* Phillip R. Vande Kamp & Harry M. Kaiser, *Commodity Promotion Programs in the United States* 2, 8 (1999), *available at* http://www.aem.cornell.edu/special_programs/commodity/nicpre/bulletins/rb0104.pdf (last visited Aug. 20, 2004); *see also* Forker & Ward, *supra*, at 101.

[14] *See* USDA, Agricultural Mktg. Programs, *available at* http://www.ams.usda.gov/repromo.htm (last visited Aug. 20, 2004).

marketing orders.[15] The total budget for all of the California commodity programs in 1992 was $112.94 million.[16]

Numerous econometric studies confirm that these programs are highly effective in increasing demand and thus yield a positive return to the producers who fund them. Independent third-party evaluations of several federal commodity promotion programs (required by § 501(c) of the FAIR Act) show that the Dairy, Beef, Soybeans, Pork, Raisins, Eggs, Walnuts, Florida Tomatoes, and Papaya programs have all generated average returns of 4:1 or better.[17]

Apart from these federally mandated studies, numerous other evaluations have concluded that commodity research and promotion programs yield substantial positive returns to producers.[18] Of particular relevance here, the expert re-

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[15] *See* Economic Research Service, USDA, State Fact Sheets, *available at* http://www.ers.usda.gov/StateFacts/CA.htm (last visited Aug. 20, 2004); California Dep't of Food and Agric., List of Marketing Programs, *available at* http://www.cdfa.ca.gov/mkt/mkt/mktbrds.html (last visited Aug. 20, 2004) (two voluntary marketing "agreements" are excluded from the total of 48); USDA, Agricultural Mktg. Servs., List of Fed. Mktg. Orders, *available at* http://www.ams.usda.gov/fv/moabmotab.htm (last visited Aug. 20, 2004).

[16] *See* Hyunok Lee et al., *Mandated Marketing Programs for California Commodities* 25 (Berkeley: Univ. of Cal. Agric. Experiment Station, Giannini Found. Info. Series No. 96-1, Aug. 1996).

[17] Henry W. Kinnucan, *A Critique of the Promotion Evaluations Submitted in Fulfillment of the 1996 FAIR Act* 24 (table 1) (draft paper presented at the NEC-63 meetings held in Baltimore, Md. on Mar. 26, 2004) (Dairy (4.3:1), Beef (5.7:1), Soybeans (9.3:1), Pork (26.2:1), Raisins (7.3:1), Eggs (6.6:1), Walnuts (4.0:1), Florida Tomatoes (27.2:1-30.9:1), and Papaya (10.1:1-31.2:1)).

[18] *See, e.g.*, Hoy F. Carman & R. Kim Craft, *An Economic Evaluation of California Avocado Industry Marketing Programs 1961-1995*, at 46 (Giannini Found. Research Report No. 345, July 1998) (average benefit/cost ratio of 1.89); Julian M. Alston et al., *The California Prune Board's Promotion Program: An Evaluation* 48 (Giannini Found. Research Report No. 344, Mar. 1998) (From 1992 to 1996, "investments by prune growers in promotion through the [California Prune Board] yielded them marginal returns of at least $2.65 for every dollar spent."); Julian M. Alston et al., *The California Table Grape Commission's Promotion Pro-*

port of Professor Ronald Ward, which was entered into evidence, indicates that the Beef Program has increased demand for beef and generated a positive rate of return for beef producers who fund the program through assessments. *See* J.A. 170-173. Professor Ward concluded that on average, "for each dollar spent on the checkoff assessments," producers realized "an additional [$]5.67 net gain." J.A. 172.

2. Commodity Promotion Programs Correct the Market Failure Caused by "Free Riding."

Mandatory programs also advance the governmental interest in a strong agricultural economy by correcting a market failure—caused by the collective action problem—that, with rare exceptions, prevents producers, acting on their own, from spending funds to expand overall demand for their products. The collective action problem that hampers voluntary efforts by farmers to promote their homogenous agricultural products is similar to that accepted by this Court in other contexts to justify compelled funding of speech or association. *See, e.g., Lehnert*, 500 U.S. at 517 ("[T]he considerations that justify the union shop in the private context—the desirability of labor peace and eliminating 'free riders'—are equally important in the public-sector workplace."); *Keller*, 496 U.S. at 12 ("It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."). The federal and state commodity promotion programs that are intended to address the collective action problem in agriculture deserve similar deference.

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gram: An Evaluation (Giannini Found. Research Report No. 43, Nov. 1997) (finding substantial returns to table grape advertising and promotion over the period 1968-1993), *available at* http://giannini.ucop.edu/Monographs/43-grapes.pdf (last visited Aug. 20, 2004).

The market failure addressed by mandatory commodity research and promotion programs is well documented. Attempts to increase demand for agricultural products through promotion are plagued by "free riding": individuals are unlikely to contribute voluntarily to the provision of a good or service that they share collectively with others if they can "free ride" on the contributions of others with impunity. *See* Forker & Ward, *supra*, at 10 (a "free rider" is an "individual who shares in the benefits but is not willing to pay the appropriate share of the costs"). Advertising for homogenous agricultural commodities is such a good, and, thus, farmers of most commodities (like avocados, cherries, and grapes) are unlikely to engage in voluntary consumer advertising—either individually or collectively.

Most farm commodities, which are often distinguishable only by their packaging (if any), exhibit some characteristics of "cooperative goods." Forker & Ward, *supra*, at 21. Cooperative goods are "[p]roducts that cannot be differentiated" and for which advertising (brand or generic) "may increase total demand, but . . . cannot change market shares among product suppliers." *Id.* For such goods, the free-rider problem prevents the optimal level of promotion from being undertaken: "There would be little incentive for one brand advertiser to promote his goods, since all other suppliers would benefit without paying their share of the advertising cost." *Id.*

The problem of free riding is exacerbated when there are numerous actors involved, none of which maintains a dominant market position. As the number of participants in a collective endeavor grows, each participant receives an increasingly smaller fraction of the total benefits from every dollar it individually contributes to the provision of the collective good, making the incentive to shirk and free ride on the contributions of others increasingly strong. *See generally* Mancur Olson, *The Logic of Collective Action* 33-36, 43-48 (1971). At the same time, both the costs of making private contractual arrangements and the costs of identifying and punishing free-riders (say, by ostracism) increase.

Most agricultural industries are highly fragmented: "[A]griculture is made up of a large number of widely dispersed, atomistic producers[.]"[19] In 2002, each of the over two million farms in the United States had, on average, sales of less than $100,000, and in California there were 79,631 farms, with average total sales of just $323,205.[20] For example, there are 6,000 avocado growers just in California.[21] In contrast, 75% of the U.S. soft drink market is concentrated in two companies (Coca-Cola and PepsiCo), each of which had annual revenues in 2003 of at least $20 billion; 75% of the U.S. peanut butter market is controlled by three companies (J.M. Smucker (Jif), Unilever (Skippy), and ConAgra Foods (Peter Pan)), each of which had annual revenues in 2003 of at least $1.3 billion; and 56% of the U.S. breakfast cereal market is concentrated in three companies (Kellogg, Kraft Foods, and Quaker Oats), each of which had annual revenues in 2003 of at least $8 billion.[22]

For these reasons, individual brand advertising is unlikely to occur for many agricultural products. The average small farmer—unlike Coke, Jif, and Kellogg—cannot afford to run branded consumer advertising, and, even if he or

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[19] J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 Mercer L. Rev. 763, 767 (1993).

[20] *See* 2002 Census of Agriculture, vol. 1, ch. 1, tbl. 1, http://www.nass.usda.gov/census/census02/volume1/us/st99_1_002_002.pdf (last visited Aug. 20, 2004); *id.*, vol. 1, ch. 2, tbl. 2, *available at* http://www.nass.usda.gov/census/census02/volume1/us/st99_2_002_002.pdf (last visited Aug. 20, 2004).

[21] *See* The Laureates of the Univ. of Cal., Riverside, *California Avocado Commission*, *available at* http://www.development.ucr.edu/perpetual/perplaureatescac.html (last visited Aug. 20, 2004).

[22] *See Market Share Reporter* 273, 395 (Robert S. Lazich ed. 2003); C. McGlone et al., *Smucker (J.M.) Co., The - Initiating Coverage*, Deutsche Bank Securities Inc. (Mar. 2003); Hoover's, Company Records for Coca-Cola Co., PepsiCo, Inc., Kellogg Co., Kraft Foods Inc., Quaker Oats Co., The J.M. Smucker Co., Unilever PLC, and ConAgra Foods, Inc., 2003 Annual Sales. (Quaker Oats was acquired by PepsiCo, Inc. in 2001.)

she could, it would not be economically rational to do so.[23] One commentator has described the small farmer's plight as follows:

> For farmers growing homogenous products, in the absence of a significant market presence, there is no incentive for . . . an individual producer . . . to engage in advertising because other producers of the same commodity may free ride upon this advertising. An individual producer[] [can] either advertise in the hopes of establishing a distinguishable brand or refrain from advertising altogether. More often than not, because agricultural commodities are indistinguishable, the latter decision is made. Thus, a suboptimal level of advertising is expended in the industry[.]

Crespi, *supra*, at 11-12. Indeed, the expert report submitted in this case explains that individual agricultural commodity advertising is often impossible: "Given both the high entry cost for developing a meaningful promotion program and the free rider issue, for many industries the only option is to fund an industry wide effort . . . ." J.A. 168.

The free-rider problem is also likely to undermine any voluntary efforts by producers collectively to generate generic advertising because "[g]eneric advertising of a homogenous commodity is a type of public good." Henry W. Kinnucan & Øystein Myrland, *Free-Rider Effects of Generic Advertising: The Case of Salmon*, 19 Agribusiness 315, 315

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[23] Thus, it is no surprise that with respect to many commodities, consumers do not recognize brands and do not make purchase decisions based on brand. A survey of 808 primary grocery shoppers revealed that when purchasing fresh grapes, the following factors, rather than brand, are the most important: ripeness/freshness, whether the grapes are seedless, taste, price, color, size, appearance, and whether the grapes were in season, organic, domestically grown, and conveniently packaged. *See* California Table Grape Comm'n, Brand Survey, *available at* http://www.freshcaliforniagrapes.com/consumer_research.pdf (last visited Aug. 20, 2004). By contrast, 40% of peanut butter shoppers said brand was the most important factor to them. *See id.*

(2003). The "benefits of any price rise caused by the advertising are shared by all of the commodity's producers regardless of whether they paid into the program." *Id.* And this "ability to 'free ride' weakens the producer's incentives to contribute to the program." *Id.* "Hence, in the parlance of public good theory . . . 'collective' goods like generic advertising tend to be under-provided relative to the social optimum." *Id.*; *see also* J.A. 168 (without mandatory commodity promotion programs, "it is impractical if not impossible for producers within some industries to address the informational needs for the good of the total industry").

Empirical evidence confirms what theory predicts. Economic analysis of individual firm advertising patterns, for example, reveals that firms generally commit the most resources to consumer advertising where there is strong product differentiation (such as is created by meaningful brands) and a highly concentrated industry structure (*i.e.*, where there are few sellers).[24] Furthermore, the actual history of some voluntary commodity promotion programs supports the theory. For example, the experience of the American Egg Board shows how a voluntary promotion program can unravel due to the free-rider problem. In the first years of the Egg Board's voluntary program, very few producers requested refunds. But by 1988, almost half of the assessments were being refunded. *See* Forker & Ward, *supra*, at 126. The same phenomena occurred in the cotton research and promotion program, which before 1990 allowed producers to request a refund of their assessments. Over time the percentage of producers requesting refunds increased steadily, severely undermining the program's efficacy and fairness. *See id.* at 122 (noting that 35% of producers were requesting refunds by 1990).

In short, absent the use of mandatory programs, only commodities with concentrated market structures will

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[24] *See* Michael S. Willis & Richard T. Rogers, *Market Share Dispersion Among Leading Firms as a Determinant of Advertising Intensity*, 13 Rev. of Indus. Org. 503-506 (1998).

achieve even close to optimal levels of product promotion. In markets where small farmers predominate, commodity advertising will be nonexistent. And in addition to generating a suboptimal amount of commodity promotion—and thus favoring industries with greater market concentration—the free-rider problem also allows some producers unfairly to benefit from the consumer advertising, if any, that is actually produced.

Legislation requiring producers of a commodity to band together and to fund promotion collectively is a straightforward response to the collective action problem. *See* Forker & Ward, *supra*, at 10 (the mandatory commodity promotion programs that replaced earlier voluntary programs "are a direct outgrowth of the potential free-rider problem."); *Commodity Advertising and Promotion* xiv (Henry W. Kinnucan et al. eds., 1992) (forward by Alan D. Forker) ("[I]nherent in the voluntary arrangement is the 'free rider' problem. In addition to the inequity involved, the 'free rider' issue made it difficult to collect enough money to develop effective programs."). Indeed, Congress and the States have recognized the free-rider problem when enacting commodity promotion programs. *See* FAIR Act § 501(b)(7) (such programs employ "promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ."); Cal. Food & Agric. Code § 63901(c) (commodity promotion programs needed for agricultural industries, "which tend to be decentralized with many small entities operating in diverse locations."). Moreover, Congress recognized that it is small producers in particular who need to be able to come together to promote their products collectively. *See* FAIR Act § 501(b)(10) ("[G]eneric commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.").

B. Mandatory Commodity Promotion Programs Directly Advance an Important Governmental Purpose and Are Narrowly Tailored.

1. As the dissenting opinion in *Wileman* suggests, the question whether a particular program directly advances the important governmental purposes of "stabiliz[ing] markets for covered agricultural products and maintain[ing] the prices received by farmers" necessarily requires case-by-case analysis. 521 U.S. at 492 (Souter, J., dissenting). The vast majority of commodity research and promotion programs, and the Beef Program in particular, however, should satisfy this test.

The dissenting Justices in *Wileman*, for example, noted that the Government offered nothing more than "speculation" in support of its contention that the treefruit program "appreciably increase[d] the total amount of advertising for" mushrooms. *Id.* at 501. Here, in contrast, the record amply demonstrates that the Beef Program has substantially increased demand (and thus price) and that, without the program, neither individual cattlemen nor voluntary associations would have the incentive or ability to engage in similar demand-expanding activity. *See* J.A. 168-173. Moreover, there is no reason to believe that the program creates any disincentives for cattlemen to engage in voluntary advertising—if they were otherwise so inclined or able—particularly since they actually have more, rather than less, revenue to spend given the program's success.

Similarly, even under the reasoning of the dissenting Justices in *Wileman*—who questioned whether the Agricultural Marketing Agreement Act of 1937 ("AMAA") was implemented in a manner consistent with the "the Act's stated purposes," *see* 521 U.S. at 494, 495-499 (Souter, J., dissenting)—the Beef Act and the vast majority of other programs raise no concerns.[25] The purpose of the Beef Act, for exam-

[25] Whether the adoption of any given federal marketing order is rational, moreover, is a fact-specific question that should be analyzed on a case-by-case basis.

ple, is "to maintain and expand domestic and foreign markets and uses for beef and beef products," 7 U.S.C. § 2901(b), and it directly advances this purpose by targeting a single commodity for promotion throughout the United States. *See* 521 U.S. at 493 ("[I]f the Government were to attack these problems across an interstate market for a given agricultural commodity or group of them, the substantiality of the national interest would not be open to apparent question."). Similarly, California's overall approach to commodity research and promotion, far from being arbitrary, is best described as comprehensive. Forty-eight commodities are covered, including the State's top five, and the coverage spans producers statewide.

2. The Beef Act and the vast majority of similar research and promotion programs are, likewise, narrowly tailored. Under intermediate scrutiny, the "fit" between the legislative purpose and the means used to achieve that end need not constitute "the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480 (internal quotation omitted). Moreover, it is well settled that the government may "attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer*, 471 U.S. at 651 n.14.

By their nature, most commodity research and promotion programs are quite narrowly tailored: (1) they do not limit in any way a farmer's ability to speak on any subject he or she may choose to address; (2) they do not require any producer "to engage in any actual or symbolic speech"; and (3) they "do not compel the producers to endorse or to finance any political or ideological views." *Wileman*, 521 U.S. at 469-470. Moreover, non-mandatory efforts at joint advertising have not succeeded. *See supra* pp. 21-22.

Some have argued that a law authorizing the mandatory collection of assessments from producers of a commodity to be used for promotion is not narrowly tailored because there exists the supposedly less restrictive alternative of funding a promotion program with "general [tax] revenue." *Gerawan*

Farming, 90 P.3d at 1194; *Pelts & Skins, LLC* v. *Landreneau*, 365 F.3d 423, 434 n. 21 (5th Cir. 2004). That argument, however, misunderstands the purpose of the laws at issue. As discussed in more detail above, laws allowing producers of a commodity to put in place a mandatory commodity promotion program are a direct response to the collective action problem that prevents those producers from banding together voluntarily to produce the optimal amount of advertising for that commodity. The remedy for a market failure that prevents a group from acting together to produce a good for its collective benefit is not to make someone else pay for the good. Just as the problem of collective action in the labor context is not more narrowly redressed by requiring that all taxpayers fund a union's collective bargaining activities, Congress was entitled to make the judgment that only those who most directly benefit from the demand-expanding activity of the Beef Program should be required to fund that effort.

Finally, unlike the AMAA, neither the Beef Act nor the vast majority of similar laws takes an inconsistent stance with respect to credits for individual brand advertising. *Cf. Wileman*, 521 U.S. at 502-503 (Souter, J., dissenting). A credit program, moreover, is unfair to smaller producers, who cannot afford to purchase their own advertising; risks promoting one or two powerful brands instead of the overall industry; and ignores the fact that effective consumer advertising is very expensive and thus effective only when resources are combined.

IV. Commodity Programs That Require Producers to Associate For Important Reasons Apart from Conducting Generic Advertising Satisfy the "Germaneness" Test of *Abood*.

As discussed above, a mandatory commodity program that does nothing more than undertake generic advertising can be sustained under the government-speech doctrine or under intermediate scrutiny. But as the Court explained in *Wileman* and *United Foods*, a law requiring that producers jointly fund various commercial activities—just one of which

is generic advertising—designed to strengthen the economic position of their industry, is also constitutional under the "germaneness" test of *Abood* and *Keller*.[26]

A. In *Abood*, the Court applied a relaxed form of scrutiny and held that nonunion employees could be compelled to fund, over their ideological objections, activities that were "germane" to the union's collective bargaining function. 431 U.S. at 235; *see also Keller*, 496 U.S. at 13-14 ("The State Bar may therefore constitutionally fund activities germane to" the goals of "regulating the legal profession and improving the quality of legal services" with "the mandatory dues of all members."). Compelling employees to associate for purposes of collective bargaining was justified to "distribute fairly the cost of these activities among those who benefit [and] counteract[] the incentive that employees might otherwise have to become 'free riders' [who] refuse to contribute to the union while obtaining the benefits." *Abood*, 431 U.S. at 222; *see also Keller*, 496 U.S. at 12.

The Court applied this germaneness test in both *Wileman* and *United Foods*. In *Wileman*, the Court held that to the extent the tree-fruit marketing program at issue implicated the First Amendment, it was constitutional under *Abood* because the generic advertising was "unquestionably germane to the purposes of the marketing orders." *Wileman*, 521 U.S. at 473. In *United Foods*, the Court declined to follow *Wileman* because "almost all" of the mandatory assessments for the mushroom promotion at issue there were used for generic advertising and thus the only program the compelled assessments served was "the very advertising scheme in question." 533 U.S. at 412, 415.

In combination, *United Foods* and *Wileman* make clear that compelled funding of generic advertising undertaken by

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[26] Whether the Beef Act is constitutional under this standard is reasonably encompassed within the questions presented. If the Court does not reach this issue, however, it should make clear that it is not implicitly foreclosing this independent and previously established defense.

a commodity research and promotion program is constitutional under *Abood* if the advertising is "germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415. Where a program requires producers to associate in order cooperatively to market their product, as in *Wileman*, this requirement is met. *See id.* The same is also true where a law requires producers of a commodity to associate for other economic purposes, such as undertaking research and development that will benefit the entire industry or working to open or expand export markets for a commodity. Such purposes, which further the overarching goal of improving the economic position of an agricultural industry, are related to economics, not speech.

Moreover, as in the union context, there is a need to mandate collective action to pursue these activities. The free-rider problem that affects small producers of commodities in fragmented industries (discussed above) prevents those producers from banding together voluntarily to engage in the optimal amount of research and development and efforts to expand export markets. For a group of producers, research and promotion and market access activities, like generic promotion, are "public goods." If a new seedless variety of grape is developed, a method for dealing with pests is improved, a compound in grapes that prevents heart disease better understood, or an export market for grapes opened, then all grape producers benefit. Such "goods" are often too expensive for one producer to pursue and often difficult, if not impossible, to pursue through voluntary collectives, which face the threat of free-riding.

In short, mandatory associations for research and development, export market development, and other similar activities are precisely the sorts of economic arrangements governed by *Abood*. Accordingly, to the extent generic advertising is germane to these programs, the entire program is constitutional under *Abood* and its progeny.

B. For many commodity programs, the germaneness test will be readily met. *First*, many commodity programs

require producers to associate for an economic purpose distinct from generic advertising. The Ketchum Act, Cal. Food & Agric. Code §§ 65500 et seq., which establishes the California Table Grape Commission, for example, states that its purpose is not merely to support generic advertising, but to "aid producers of California fresh grapes in preventing economic waste in the marketing of their commodity, to develop more efficient and equitable methods in such marketing, and to aid such producers in restoring and maintaining their purchasing power at a more adequate, equitable, and reasonable level." Cal. Food & Agric. Code § 65500(g). The statute, therefore, gives the Commission the authority, among other things, (1) to "conduct . . . scientific research" regarding "the dietetic value of fresh grapes," "cultural practices and product handling," and "the production, storage, refrigeration, inspection, and transportation of grapes," and (2) "to present facts to and negotiate with state, federal, and foreign agencies on matters which affect the marketing and distribution of fresh grapes." *Id.* § 65572(h), (i), (k).

In practice, moreover, many commodity research and promotion programs engage in significant economic activity distinct from generic advertising. To use the California Table Grape Commission again as an example, it funds research into the phytonutrients in grapes that may prevent or cure disease; viticulture research related to the development of new varieties of grapes, the control of pests, and other issues of concern to growers; and category management research to determine how retailers can most effectively sell grapes to consumers. The Commission also undertakes substantial efforts to open foreign markets to California grapes. It worked, for example, with the United States Department of Agriculture and the United States Trade Representative to open China and Australia to California grapes, and it continues to work to keep those and other markets open.[27] These activities and many others fur-

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[27] *See generally* California Table Grape Commission website, *available at* http://www.freshcaliforniagrapes.com (last visited Aug. 20, 2004).

ther California's goal of "aid[ing] producers of California fresh grapes." Cal. Food & Agric. Code § 65500(g).

Second, the generic advertising undertaken by commodity research and promotion programs of this sort is unquestionably "germane" to the economic purpose of the programs. *See Wileman*, 521 U.S. at 473. The advertising itself increases demand for the commodity. Moreover, the advertising often works in tandem with the program's non-speech, economic activities. For example, the statute governing the California Table Grape Commission authorizes it to "educate and instruct the public with respect to . . . the healthful properties and dietetic value of fresh grapes." Cal. Food & Agric. Code § 65572(i). And in practice, the Commission's advertising campaign, which has described grapes as "The Natural Snack," pursues exactly that goal. Programs like this, that engage in advertising as just one tool among many to increase demand, and that would not receive adequate funding if left to voluntary contributions, satisfy the germaneness test of *Abood*.

C. The Beef Program itself readily meets this test. Its purpose—"to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef," 7 U.S.C. § 2901(b)—is purely economic and unrelated to speech. And the program's advertising is germane to this purpose. The generic beef advertising is just one part of a larger program involving significant research and consumer information activities, including research and education projects addressing foodborne pathogens, the proper handling of beef products, nutrition and health, and cattle diseases, including mad cow disease. *See, e.g.*, Brief for Pet'rs Nebraska Cattlemen 13-16, 49 n.16. Because the Court of Appeals failed even to consider whether the Beef Program could pass muster under *Abood*'s germaneness test, a remand with respect to this issue is appropriate.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
TODD C. ZUBLER
BRIAN M. BOYNTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for the California Agricultural Issues Forum

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In the

Supreme Court of the United States

ANN VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* CAMPAIGN FOR FAMILY FARMS AND 49 FAMILY FARM AND RANCH ORGANIZATIONS IN SUPPORT OF RESPONDENTS

Susan E. Stokes
Counsel of Record
David R. Moeller
Karen R. Krub
FARMERS' LEGAL ACTION GROUP, INC.
360 North Robert Street, Suite 500
Saint Paul, MN 55101
(651) 223-5400

October 15, 2004

QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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STATEMENT OF INTEREST[1]

> "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to its liberty and interests by the most lasting bonds." 5 The Writings of Thomas Jefferson 93 (Albert E. Bergh ed.) (1905).
>
> "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 774 (W.D. Mich. 2002) (*MPPA* I) (quoting Thomas Jefferson, Virginia Act for Establishment of Religious Freedom (1786), codified at Va. Code § 57-1).

These two Jeffersonian ideals are melded by *Amici Curiae* the Campaign for Family Farms (CFF) and 49 family farm and ranch organizations[2] who join Respondents in their opposition to the Beef Act's mandatory promotion program (beef "checkoff").

CFF is a coalition of family farm organizations whose hundreds of hog farmer members oppose paying the mandatory pork checkoff. CFF conducted a petition drive that resulted in a USDA-conducted referendum on the pork checkoff program in which the majority of participating hog farmers voted to terminate the program. Secretary of Agriculture Veneman refused to honor the referendum.

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for any party to these proceedings authored, in whole or in part, this *Amici Curiae* brief. No other entity or person, aside from the *Amici*, made any monetary contribution for the preparation or submission of this brief to the Court. This brief is filed pursuant to Sup. Ct. R. 37.3(a). The requisite consent letters have been filed with the Clerk.

[2] *Amici* are listed in the attached Appendix.

MPPA I, 229 F. Supp. 2d at 775. After this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001),[3] CFF and four individual hog farmers, James Dale Joens, Richard Smith, Rhonda Perry, and Lawrence E. Ginter, Jr., brought a claim before the United States District Court for the Western District of Michigan alleging that the pork checkoff violates hog farmers' First Amendment rights of freedom of speech and association. *MPPA* I, 229 F. Supp. 2d at 775. On October 25, 2002, the district court granted CFF's motion for summary judgment, holding that the pork checkoff was "unconstitutional and rotten" and violated hog farmers' First Amendment rights of free speech and association. *Id.* at 791. The Sixth Circuit affirmed the district court's ruling, finding that the pork checkoff compels hog farmers "to express a message with which they do not agree." *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 163 (6th Cir. 2003) (*MPPA* II) *petition for cert. filed sub nom. Veneman v. Campaign for Family Farms* (U.S. Feb. 19, 2004) (No. 03-1180).

Joining CFF in submitting this brief are 49 family farm and ranch organizations with members from all 50 states. These organizations represent hundreds of thousands of family farmers and ranchers who raise cattle, hogs, other livestock, and poultry; milk dairy cows; grow corn, soybeans, and other commodities; and produce and market locally grown fruits and vegetables. The organizations include the National Farmers Union (an organization of 250,000 members), the National Family Farm Coalition (a coalition of 21 family farm groups), the National Farmers Organization, the Federation of Southern Cooperatives, the Intertribal Agriculture Council, state cattle and ranch organizations, state and national sustainable agriculture organizations, and other

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[3] CFF joined family farmers and ranchers in filing an *Amici Curiae* brief in *United Foods* urging this Court to affirm the Sixth Circuit's ruling.

leading state and national farmer-based organizations. *Amici* strive to build sustainable rural communities, promote responsible stewardship of soil, water, and other resources, and ensure that land can be farmed and grazed for future generations.

Amici represent hundreds of thousands of "cultivators of the earth" who pay and ardently oppose mandatory agricultural checkoffs, which compel them to fund objectionable ideological speech that is aligned with private industry organizations' policies. These policies must be viewed in the context of the dramatic changes in agriculture. Agribusiness corporations are consolidating and controlling increasingly more agricultural industries.[4] Note, *Challenging Concentration of Control in the American Meat Industry*, 117 Harv. L. Rev. 2643 (2004). As the number of meatpackers shrinks, ranchers find themselves with at most three meatpackers to buy their cattle, and in some markets only one. Roger A. McEowen, *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 Drake J. Agric. L. 267, 274 (2002). USDA's Small Farms Commission observed: "Concentration translates into the loss of open and competitive markets at the local level . . . . The basic tenets of a 'competitive' market are less and less evident in crop and livestock markets today." USDA Nat'l Comm'n on Small Farms, *A Time to Act: A Report of the USDA National Commission on Small Farms*, 4-5 (Jan. 1998), *available at* http://www.csrees.usda.gov/nea/ag_systems/pdfs/time_to_act_1998.pdf.

With fewer marketing options come lower prices for farmers and ranchers, driving them into unfavorable

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[4] Four meatpackers control over 81% of the cattle slaughter industry and four meatpackers control 56% of the hog slaughter industry. USDA, GIPSA, *Assessment of the Cattle and Hog Industries: Calendar Year 2001* 18, 38 (June 2002), *available at* http://www.usda.gov /gipsa/pubs/01assessment/01assessment.pdf.

contracts[5] or out of business.[6] *Id.* at 36-37; Clement E. Ward, *Concentration in the Red Meat Packing Industry*, at *Role of Captive Supplies in Beef Packing* (1996), *available at* http://www.usda.gov/gipsa/pubs/packers/conc-rpt.htm#chap3. For those ranchers who remain, there have been multiple years of raising cattle with significant financial losses, forcing ranchers to give up health insurance, take off-ranch jobs to supplement income, and incur more debt. Terence P. Stewart, *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 Minn. J. Global Trade 449, 455-86 (2000).

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[5] Approximately 33% of the United States cattle supply is being marketed through contracts to meatpackers. USDA, GIPSA, *Captive Supply of Cattle and GIPSA's Reporting of Captive Supply* at viii (2002), *available at* http://www.usda.gov/gipsa/pubs/captive_supply/captive supplyreport.pdf. In the hog industry, more than 88% of hogs were committed to packers through ownership or contractual arrangements in 2004, up from 56% in 1997. National Pork Board (NPB), *Hog Marketing Contract Study* (Jan. 2004), *available at* http://agebb.missouri.edu /mkt/vertstud04.htm.

[6] Nationwide, the number of farmers and ranchers fell from 6.8 million in 1935 to fewer than 2 million in 1997. Robert A. Hoppe, *Structural and Financial Characteristics of U.S. Farms: 2001 Family Farm Report*, USDA ERS Agriculture Information Bulletin No. 768, 6-7 (May 2001), *available at* http:www.ers.usda.gov/publications/ aib768/aib768.pdf. When the beef checkoff became mandatory in 1988, there were approximately 1,350,000 cattle operations in the United States; as of 2003, the number had diminished to 1,036,000, an almost 24% decrease. USDA NASS, *Number of All Cattle and Beef Cow Operations, United States, 1988-2003* (Apr. 30, 2004), *available at* http://www.usda.gov/nass/aggraphs/acbc _ops.htm. The number of dairy farms has decreased dramatically from 650,000 in 1970 to approximately 90,000 in the early 2000s. USDA ERS, *Dairy: Background* (July 6, 2004), *available at* http://www.ers.usda. gov/Briefing/Dairy/Background.htm. The same holds true in the hog industry. In 1980 there were 666,550 hog farms in the United States; as of 2003, the number had diminished to 73,600. The PigSite News Print, *US Swine Economics Report* (May 19, 2004), *available at* http://www.thepigsite.com/LatestNews/print-news.asp?display=7577.

The decline in the number of farmers and ranchers combined with the shift toward consolidation and corporate control of livestock has had devastating economic effects on independent family farmers and ranchers and their rural communities. As acknowledged by 24 United States Senators, when cattle ranchers suffer, rural communities suffer:

> Given that beef cattle production comprises the largest single component of the country's agricultural base, the perilous state of the cattle industry adversely affects the economic health of our rural communities and our states as a whole. When cattle producers go out of business, Main Street in much of rural America goes out of business. The crisis in the cattle industry has led to depopulation of rural areas, the closing of schools and entire towns, and declining tax bases for local, county, and state governments. In some states, families may have to drive a hundred miles or more to obtain provisions because of the collapse of so many towns.

USITC Inv. 701-TA-386, Letter to Lynn Bragg, Chair, U.S. International Trade Commission (Oct. 5, 1999).

In order to preserve and protect rural communities, *Amici* have advocated for many years for the strengthening of the family farm and ranch system of agriculture. In their efforts to preserve independent family farms and ranches, *Amici* have encountered significant opposition from associations that are funded by and support the beef checkoff and other mandatory agricultural checkoffs. *Amici* have witnessed firsthand the negative consequences the policies of checkoff-funded organizations have had on America's family farm and ranch system of agriculture. *Amici* and their members object for economic, ideological, and political reasons to the beef checkoff and other mandatory checkoffs; they believe the mandatory checkoffs contribute to further industry vertical integration and consolidation to the detriment of the family

farm and ranch system of agriculture. The trends described above will only be exacerbated if the beef checkoff continues to compel ranchers to fund their own demise. Therefore, *Amici* fully support Respondents in urging the Court to affirm the Eighth Circuit's ruling that the beef checkoff is unconstitutional and should be terminated.

SUMMARY OF ARGUMENT

Mandatory agricultural promotion programs compel farmers and ranchers to fund messages to which they object. The checkoffs associate all farmers and ranchers who pay the checkoff with those objectionable messages through attribution and through the compelled funding itself. They also compel farmers and ranchers to associate with the private boards and organizations that administer the programs. Those organizations spend, collectively, hundreds of millions of farmers' and ranchers' hard-earned dollars each year to fund programs the farmers and ranchers vehemently oppose. They use that money to keep their organizations afloat, and use the credibility derived from being the "voice" of farmers and ranchers through the checkoffs to lobby against family farmers' and ranchers' interests on political issues.

The purported governmental interest in the checkoff programs is to stimulate demand for each of the commodities they promote, yet many of those commodities actually compete in the marketplace. The government cannot satisfy its heavy burden to justify the infringement on farmers' and ranchers' First Amendment association rights when the only interests at stake are the conflicting interests of private industry participants.

The speech generated by the checkoffs is more than merely commercial; it is also ideological and political, and the effects on those compelled to finance it have been degrading rather than helpful. Because the checkoffs compel farmers and ranchers to fund ideological and political speech, they should be subject to the highest level of scrutiny. Under this Court's compelled speech precedent, the Beef Act is

unconstitutional. Even under an intermediate level of scrutiny, the beef checkoff is unconstitutional.

ARGUMENT

I. THE BEEF ACT VIOLATES RANCHERS' FIRST AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION.

A. The Beef Act Compels Ranchers To Associate With Groups and Speech They Abhor.

The Court has long embraced the paramount importance of the constitutional right of association, recognizing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court also has made it clear that the First Amendment guarantees a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-09, 932-33 (1982); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)). Freedom of association "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623 (citing *Abood*, 431 U.S. at 234-35). Compelling an individual to financially support an organization for expressive purposes interferes with the individual's First Amendment right to associate for the advancement of ideas, or to refrain from doing so. *Abood*, 431 U.S. at 234-36.

Ranchers who pay the mandatory checkoffs are compelled to associate with the speech of the groups that administer them. All ranchers are compelled to fund—and thus associate with—the generic promotion of beef. As detailed in Respondents' brief, ranchers believe that beef raised, slaughtered, and processed in the United States is a superior product and should be marketed as such. They object

to the generic promotion of beef, including imported beef, because it tells consumers that all beef is the same, which they do not believe. U.S. Petition for Certiorari Appendix (U.S. Pet. App.) 11a, 35a-37a. Like the mushroom growers in *United Foods*, their livelihood depends on the sale of their product. Also like the mushroom growers, they believe the generic promotion has a detrimental effect on their livelihood.

Although ranchers are not compelled by mandatory checkoffs to directly utter the objectionable messages, as in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), they are associated with the speech by being coerced to support it as a precondition of earning a livelihood. By virtue of being part of a discrete group that earns their living by ranching, they alone, and not a general group of taxpayers, are compelled to fund the message associated with the checkoffs and the groups that administer them.[7] *Cf. Keller v. State Bar of Cal.*, 496 U.S. 1, 10-11 (1990); *Abood*, 431 U.S. at 259 n.13 (Powell, J. concurring).

Even more strongly associating ranchers with the objectionable speech they are compelled to support is the visible attribution of the speech to them. *See Wooley v. Maynard*, 430 U.S. 705 (1977). Beef checkoff-funded television ads, which ran more than 1,500 times in 2003 alone, include the attribution line "Funded by America's Beef Producers." Cattlemen's Beef Board (CBB), *2003 Beef Board Annual Report*, 6 (2004), *available at* http://www.beefboard.org/documents/2003%20Annual%20Report.pdf; http://www.beefitswhatsfordinner.com/ads/tv.asp. Print ads similarly state that they are "Funded by America's

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[7] *Amici* join Respondents in asserting that the "so-called government speech doctrine" is inapplicable here, where the speech is funded solely by "America's Beef Producers." *See Keller*, 496 U.S. at 10-11; *MPPA* II, 348 F.3d at 161-62.

Beef Producers."[8] *See, e.g.*, http://www.beefitswhatsfordinner.com/ads/default.asp.

In addition to being compelled to associate with objectionable speech, ranchers are compelled to associate with the organizations that administer the checkoff programs—associations to which they fervently object. For example, even though dissenting ranchers are not forced to become actual members of the National Cattlemen's Beef Association (NCBA), their money is used to support it as the general contractor for the beef checkoff and fund its checkoff-related expressive activities. *See* http://www.beefitswhatsfordinner.com/footer/aboutus.asp. NCBA, a private, non-profit organization, has annual revenues of approximately $62,500,000, of which 87% comes from ranchers' beef checkoff dollars.[9] Joint Appendix (J.A.) 185-87. NCBA is virtually indistinguishable from CBB, the organization actually charged with administering the beef checkoff.[10] The

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[8] The same is true for the pork and dairy checkoff programs. Pork checkoff-funded communications, such as advertising, press releases, reports, and producer communications proclaim that they are being brought to the audience by "America's Pork Producers." *MPPA* I, 229 F. Supp. 2d at 786. Dairy checkoff funded advertisements are also attributed to "America's Dairy Farmers and Milk Processors." *See* http://www.whymilk.com/celebrity_cc_history_vint.htm (showing tv ads), http://www.whymilk.com/celebrity_archive.htm (showing print ads).

[9] It is telling that nowhere in Petitioners' briefs do Petitioners mention NCBA, let alone its unbridled power over the beef checkoff.

[10] For instance, a visitor to the website www.beef.org would find it impossible to discern with any certainty if the website belongs to NCBA, whose name appears prominently on the home page, or if the website is the official beef checkoff website. That same home page prominently displays the "Beef, It's What's For Dinner" logo, and bears an icon with a large red check, apparently referring to the beef checkoff. Clicking on that icon directs the reader to a CBB website, which contains only general information about the beef checkoff. *See* http://www.beefboard.org/. Communications to ranchers typically refer the readers to both CBB's and

so-called "firewall" between NCBA's checkoff-funded activities and its non-checkoff-funded activities[11] has been referred to by some ranchers as a "myth" and a "joke." J.A. 197-98, 205. *See also, Livestock Mktg. Ass'n v. USDA*, 132 F. Supp. 2d 817, 822-23 (D.S.D. 2001).

The CBB website, which is funded entirely by checkoff dollars, describes NCBA as follows:

> Producer-directed and consumer-focused. NCBA is the trade association of America's cattle farmers and ranchers, and the marketing organization for the largest segment of the nation's food and fiber industry. It is the nonprofit domestic planning and marketing organization responsible for increasing demand for U.S.-produced beef and an authority on beef and its related topics.
>
> The NCBA works on behalf of America's Beef Producers and is contracted by the Cattlemen's Beef Promotion and Research Board.

http://www.beefitswhatsfordinner.com/askexpert/inthenews.asp. NCBA repeats this claim in its checkoff communications. *See, e.g.*, http://www.beef.org/dsp/dsp_content.cfm?locationId=44&contentTypeId=2&contentId=2648.

NCBA's claim to be the "trade association of America's cattle farmers and ranchers" is objectionable to the many ranchers who disagree with the mandatory beef checkoff and the policies of NCBA. Many ranchers have chosen to associate with other organizations that they believe better represent their interests, such as Respondent Western

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NCBA's websites. *See, e.g.*, http://www.beefboard.org/documents/dairy_nutrition%20Dec%2023.pdf.

[11] CBB itself admits the alleged distinction is confusing. *See* CBB Press Release, *Defining the Separate Roles of the Beef Board and Other Checkoff Players* (Dec. 5, 2003), *available at* http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1071&contentTypeId=2&contentId=2383.

Organization of Resource Councils or *Amici* groups like the Kansas Cattlemen's Association, or the South Dakota Stockgrowers Association. *See, e.g.,* J.A. 200-01, 209, 215-16, 218-19, 222-23. Indeed, out of the nearly one million cattle ranchers in the United States, NCBA can claim only about 33,000 individual members. *See* http://www.beef.org/dsp/dsp_locationContent.cfm?locationId=881.

Despite many ranchers' opposition to NCBA's baldly political positions, the mandatory checkoff unavoidably associates all ranchers with NCBA's political advocacy. NCBA's political activism is ostensibly funded with the 13% of the its budget that does not come from the beef checkoff, but CBB and NCBA portray NCBA messages as coming from all ranchers. The www.beef.org website that includes commingled beef checkoff information and NCBA policy information (on which NCBA is prohibited from spending checkoff funds) includes a section of press releases on a variety of policy issues. One of the more recent releases announces the decision of the NCBA Board that NCBA PAC would "endorse and financially support" George Bush because his policies "most closely match the policies of the NCBA." NCBA Press Release, *NCBA PAC Endorses President George W. Bush* (Aug 13, 2004), *available at* http://www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2731. Apparently the reader of the website is supposed to surmise that this particular press release was not paid for or associated with the beef checkoff, since it does not have a little red checkmark next to it. However, since NCBA's "unanimous" endorsement was—as intended—covered by the media (*e.g.*, Philip Brasher, *Politics Thrusts Ag Stakes Higher*, Des Moines Register, Aug. 29, 2004), a reader would not be able to determine that NCBA's actions were not funded by the beef checkoff and not spoken on behalf of all ranchers. As an example of the confusion, President Bush stated in his speech thanking NCBA: "Jan Lyons, President of the National Cattlemen's Beef Association is with us. They have given me their

endorsement. I am honored to be endorsed by the Cattlemen of the United States of America." Speech Transcript (Aug. 31, 2004), *at* http://georgewbush.com/FarmAndRanch/Read.aspx?ID=3414.

NCBA also publicly advocates for policy positions that violate the dissenters' core beliefs. One of the Respondents' primary objections to the mandatory beef checkoff is that its promotions do not distinguish imported beef from domestic beef, which Respondents believe is a better product. J.A. 35, 66, 190-91. The 2002 Farm Bill included a provision making it mandatory to label food, including meat, as to its country of origin. Pub. L. No. 107-171, § 10816, 116 Stat. 134, 533 (2002). One of the objectives of this Country of Origin Labeling (COOL) provision was to inform consumers whether the beef they buy comes from cattle raised, slaughtered, and packaged in the United States. NCBA, however, has actively opposed mandatory COOL. Jerry Hagstrom, *COOL Battle Far From Over*, AgWeek, Dec. 8, 2003, *available at* http://www.grandforks.com/mld/grandforksherald/7439869.htm. In 2004, at the urging of groups such as NCBA, Congress delayed funding of COOL, a move that outraged farmers and ranchers. Pub. L. No. 108-199, § 749, 118 Stat. 3, 37 (2004). As submitted by Senator Tim Johnson to the Congressional Record:

> Ann Veneman herself helped identify some of the culprits who killed COOL. She fingered the NCBA, the National Pork Producers Council and the United Fresh Fruit and Vegetable Association as the groups responsible for blocking its implementation. Yes, the primary contractor for your checkoff dollars, an outfit that may not even exist without your beef bucks, the NCBA, stabbed you right in the back. Again.

150 Cong. Rec. S174-S175 (daily ed. Jan. 22, 2004).

The mandatory beef checkoff compels ranchers to associate with the organizations that administer the beef

checkoff and the objectionable speech it generates in myriad ways. This compulsion offends ranchers' First Amendment right to refrain from association with objectionable groups and their messages. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

B. The Beef Act Serves the Interests of Packers and Retailers and Not a Paramount Governmental Interest, Making Packers and Retailers the True Free Riders of the Checkoff.

"It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (citing *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976)). Encroachment of First Amendment rights "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod*, 427 U.S. at 362.

In order to justify interfering with an individual's association rights by compelling assessments to fund objectionable speech, the government bears the burden of showing an "overriding associational purpose which allows any compelled subsidy for speech in the first place." *United Foods*, 533 U.S. at 413. In the labor context, the "overriding associational purpose" that justifies compelling employees to pay their share of collective bargaining activities is Congress's interest in furthering "industrial peace and stabilized labor-management relations." *Ry. Employees' Dept. v. Hanson*, 351 U.S. 225, 233-34 (1956); *see also Abood*, 431 U.S. at 219. The "overriding associational purpose" justifying compelled payments to an integrated state bar association is the state's interest in ensuring educational and ethical standards for attorneys that provide legal services to the state's citizens. *Keller*, 496 U.S. at 12, 16; *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality).

The Court already has held that there is no "overriding associational purpose" justifying compelled subsidies for the promotion of agricultural commodities in the absence of a greater collective regulatory scheme. *United Foods*, 533 U.S. at 415. In contrast to *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), which addressed the promotion portion of a broader marketing order mandating the collectivization of California tree fruit production to such an extent that the industry was exempted from antitrust laws, the Mushroom Act at issue in *United Foods* was a stand-alone statutory promotion program. *See United Foods*, 533 U.S. at 415-16. Because there was no "law or necessity" justifying the compelled association of mushroom growers in the first place, the compelled subsidies for the mushroom checkoff speech were declared unconstitutional. *Id.* at 413, 414-16.

Petitioners' briefs omit this threshold inquiry. Like the Mushroom Act, the Beef Act was enacted as a stand-alone promotion program and is not part of a greater collectivized statutory scheme. U.S. Pet. App. 11a, 47a. Accordingly, like the Mushroom Act, because there is no justification for the compelled association in the first instance, the compelled assessments under the Beef Act are unconstitutional.

The only governmental interest asserted by the Petitioners to justify the Beef Act's infringement of ranchers' First Amendment rights is found in their discussion of the intermediate standard of scrutiny applied to restrictions on commercial speech. Petitioners assert that the Beef Act advances a "substantial" government interest by "enhancing 'the welfare of beef producers,' stabilizing 'the general economy of the Nation,' and 'ensur[ing] that the people of the United States receive adequate nourishment.'" Brief for the Federal Petitioners (U.S. Br.) 47 (citing 7 U.S.C. § 2901(a)(3) and (4)). These asserted interests do not satisfy the intermediate standard of scrutiny used for analyzing restrictions on commercial speech, *see infra*, let alone the

"exacting scrutiny" required for the Beef Act's significant impairment of ranchers' association rights.

Congress has enacted multiple, competing checkoff programs. The fact that pork competes against beef in the marketplace and *vice versa* undermines any claim that the government's interest in promoting one or the other is substantial, and makes it impossible for any one checkoff program to be found "of vital importance." *See infra* at 24-25. Moreover, while asserting that the governmental interest in the mandatory beef checkoff and other checkoffs is to "stabiliz[e] 'the general economy,'" the government cannot plausibly argue that it has a paramount interest in simply promoting *more* consumption of *all* agricultural products covered by mandatory checkoffs, given USDA's conflicting interest in providing education to consumers on nutrition and healthy eating, including the well-known Food Guide Pyramid. *See* 69 Fed. Reg. 42,030 (July 13, 2004). For example, while compelling hog farmers to pay some $50 million per year to promote pork and pork products, USDA also urges consumers to "Limit your intake of high-fat processed meats such as bacon, sausages, salami, bologna, and other cold cuts." *See* USDA, *Nutrition and Your Health: Dietary Guidelines for Americans* (5th ed. 2000), *available at* http://www.health.gov/dietaryguidelines/dga2000/document/choose.htm. As set forth in more detail below, rather than promoting a governmental interest, the mandatory checkoffs in reality promote the interests of the private participants in each industry. *See infra* at 23-24.

Petitioners assert that the government has a "vital" policy interest in avoiding free riders, thus necessitating a mandatory beef checkoff. U.S. Br. 48 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519-21 (1991)). This argument misapprehends the nature of the checkoffs and the meaning of the term "free riders," which is applicable only in a constitutionally justified collective enterprise. The concern about free riders was articulated by the Court in the context of

upholding agency shop agreements in which the union is the exclusive collective bargaining representative for union and non-union members. *Hanson*, 351 U.S. at 233-35; *Lehnert*, 500 U.S. at 519. The Court upheld the requirement that nonunion members be compelled to pay for costs related to unions' collective bargaining duties, since the unions were obligated by statute to represent the non-members, and non-members would benefit in equal share as members. Accordingly, to prohibit the non-members from benefiting as free riders from the unions' statutorily imposed bargaining obligations in agency shop arrangements, non-members could be required to pay for certain costs over their objections. *See Lehnert*, 500 U.S. at 520-21 ("nonunion workers ought not to be allowed to benefit from the terms of employment secured by union efforts without paying for those services..."); *Ellis v. Brotherhood of Ry.*, 466 U.S. 435, 452 (1984) ("the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members").

The free rider concern also arises for heavily regulated industries, as was the case in *Glickman*, where individuals could "take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government." *United Foods, Inc. v. United States*, 197 F.3d 221, 224 (6th Cir. 1999). The concern about free riders thus is applicable only where there is collective activity that itself is justified by a paramount government interest. It has no applicability here, where the beef industry is not collectivized, and the participants in that industry are free actors, not free riders.

Moreover, that some individuals who choose not to participate in a voluntary checkoff may benefit from the advertising of those who do, does not provide sufficient justification for compelling all farmers and ranchers to contribute and be forced into objectionable association.

"[P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in part and dissenting in part). Indeed, the persons who benefit *most* from mandatory checkoffs are not the farmers and ranchers who pay for them, but the processors and retailers, whose products are being marketed at farmers' and ranchers' expense. U.S. Pet. App. 48a.

II. THE BEEF CHECKOFF VIOLATES RANCHERS' FIRST AMENDMENT RIGHT OF FREEDOM OF SPEECH.

A. Checkoff-Funded Speech Is Inextricably Intertwined With Expressly Ideological And Politically Partisan Speech.

The Court has unequivocally concluded that commercial speech is entitled to First Amendment protection. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The Court settled on a three-part test providing for "intermediate scrutiny" of restrictions on commercial speech, rather than the highest level of scrutiny, in its decision in *Central Hudson Gas & Elec. Corp. v. Public Ser. Comm'n*, 447 U.S. 557, 566 (1980). Once thought to be "commonsense," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978), the definition of "commercial speech" for purposes of determining which level of scrutiny applies, has proven to be more elusive as communication and marketing tools become more sophisticated. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 676-79 (2003) (Breyer, J. dissenting); *United Foods*, 533 U.S. at 409-10.

Although the Court in *Central Hudson* described commercial speech as "expression related solely to the economic interests of the speaker and its audience" (447 U.S. at 561), the Court has acknowledged the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *Cincinnati v. Discovery Network, Inc.*,

507 U.S. 410, 419 (1993) (noting that advertising publications "share important characteristics with the publications ...classifie[d] as 'newspapers.'"). It is also established that the mere fact that a publication contains an advertisement or a reference to a specific product does not convert that speech into commercial speech. *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964)). In analyzing what level of scrutiny to apply to a state statute that compelled professional fundraisers to disclose certain information to potential donors, the Court explained:

> [E]ven assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

Riley v. Nat'l Fed'n. of the Blind, 487 U.S. 781, 796 (1988).

Taking the nature of the speech as a whole, speech funded by mandatory checkoffs does not fall into the narrow category of speech that is solely commercial. Set against the backdrop of the political and philosophical divide between those who advocate for further industrialization of agriculture and those who are attempting to preserve family farming and rural communities, the speech supported by mandatory checkoffs can only be seen as economic, political, and

ideological.[12] As this Court noted in *Abood*, "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." 431 U.S. at 231.

By paying the mandatory checkoff, family farmers and ranchers are compelled to subsidize speech that supports a system of agriculture they believe is driving them out of existence. *See, e.g.*, U.S. Pet. App. 48a; *MPPA* I, 229 F. Supp. 2d at 790-91. Through the checkoff, farmers and ranchers are forced to subsidize the marketing of products they neither sell nor earn a profit from. Ranchers sell cattle, not beef. Hog farmers sell hogs, not pork. Ranchers' share of the retail beef dollar declined from nearly 70% in the 1970s to below 50% in 1996. Kenneth H. Mathews, Jr., *U. S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration*, 18-19 (Apr. 1999), *available at* http://www.ers.usda.gov/publications/tb1874/tb1874.pdf. Similarly, hog farmers' share of the retail pork dollar declined from 42.5% to 30.1% between 1996 and 2001. *MPPA* I, 229 F. Supp. 2d at 776. Family farmers and ranchers thus understandably believe that their checkoff dollars are enriching retailers and processors, to their detriment.

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[12] The records of the pending legal challenges to mandatory checkoffs demonstrate that the objecting farmers and ranchers strongly disagree with the speech they are compelled to fund. *See, e.g.*, U.S. Pet. App. 11a, 48a; *MPPA* I, 229 F. Supp. 2d at 790; *Cochran v. Veneman*, 359 F.3d 263, 266-67 (3d Cir. 2004) *petition for cert. filed* (U.S. Sept. 30, 2004) (No. 04-446). This distinguishes this case and other pending cases from *Glickman*, in which the Court presumed that the producers agreed with the advertising message. 521 U.S. at 469-70. As well, the finding by the district court that objecting hog farmers have "sincere philosophical, political and commercial disagreements" to pork checkoff-funded speech (*see MPPA* I, 229 F. Supp. 2d at 790), obviates the Court's further assumption in *Glickman* that producers were not compelled to finance "political or ideological views." 521 U.S. at 469-70.

Moreover, mandatory checkoffs compel farmers and ranchers to subsidize the promotion of products raised using methods with which they disagree. For example, the challengers to the dairy checkoff operate a small dairy, employing traditional methods of dairy farming. They emphatically believe that their method of farming—which allows cows more room to roam and graze than industrial methods allow, and which eschews the use of the recombinant Bovine Growth Hormone (rBGH)—results in healthier cows, a cleaner environment, and superior milk. *Cochran*, 359 F.3d at 266-67. Family hog farmers similarly object to funding the generic promotion of pork from hogs that are raised employing methods commonly used in factory farms, such as continuous feeding of antimicrobials. *MPPA* I, 229 F. Supp. 2d at 777. Some objecting ranchers raise grass-fed cattle without the use of artificial hormones, subtherapeutic antibiotics, chemical additives, extra water, and irradiation. *Charter v. USDA*, 230 F. Supp. 2d 1121, 1122 (D. Mont. 2002). They have strongly held views regarding ranching methods, nutrition, and food safety which are often diametrically opposed to the products promoted by the beef checkoff. *See, e.g.*, NCBA Press Release, *Beef Checkoff Educates Consumers About Irradiated Beef* (May 11, 2004), *available at* http://www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2621. The generic promotion of commodities lumps those raised by independent family farmers using what they believe are healthy and humane practices with those raised in factory farms—the same mega-farms that are driving family farmers out of existence.[13]

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[13] Speech funded under the "research" and "consumer information" portions of the checkoffs often blatantly supports industrialized agriculture. For example, a primary focus of research funded by the pork checkoff is in the area of "Antimicrobial Resistance and Alternatives Research," meaning the continuous feeding of subtherapeutic levels of antibiotics to hogs to promote growth and prevent disease—a practice

As agriculture rapidly becomes vertically integrated, packers control more livestock through captive supply arrangements, and the number of packers dwindles while their size and market power swells, generic promotion that fails to distinguish the unique qualities of family farm-raised commodities continues to harm family farmers. In the struggle to stay on their land with ever-shrinking farm income,[14] the money farmers and ranchers are forced to pay to fund generic promotion has a direct impact on their daily lives. *See MPPA* I, 229 F. Supp. 2d at 775-76.

Even more galling to farmers is "branded advertising," which uses checkoff dollars to promote the products of particular packers and retailers. *See, e.g., id.* at 776 (promoting Smithfield and Hormel pork); *see also,* http://www.beefmark.com (promoting Smithfield and Tyson beef products, among others); http://www.dairycheckoff.com /check/hl0904.asp (promoting Safeway). Because packers increasingly own livestock, checkoff-funded branded advertising forces farmers and ranchers to pay for the advertising of their direct competitors. The packers whose advertising budgets are being subsidized by farmers are also direct competitors of farmers who process and market their own products. *See MPPA* I, 229 F. Supp. 2d at 776.

The speech funded by the mandatory checkoffs—whether it is generic advertising, "branded" advertising, publications

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many independent family farmers scorn. *See MPPA* I, 229 F. Supp. 2d at 777. Pork checkoff challenger James Joens opposes checkoff-funded "education" about the same practices:

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large confinement facilities.

MPPA I, 229 F. Supp. 2d at 776.

[14] Average operator earnings from farming in 2003 were $3,991. *See* http://www.ers.usda.gov/Briefing/FarmIncome/Data/Hh_t5.htm.

pronouncing the results of "research," or "consumer information"—certainly encompasses more than just "expression related solely to the economic interests of the speaker and its audience." While the speaker in beef-checkoff funded ads is "America's Beef Producers," the speech relates less to the economic interests of ranchers than it does the economic interests of packers and retailers. Moreover, the commercial nature of checkoff-funded speech is interwoven with its underlying ideological, philosophical, and political nature. Speech that represents and supports a system of agriculture that is anathema to the objecting farmers' core economic, ideological, and political beliefs cannot be said to be merely "commercial."[15] Taken as a whole, the compelled funding of speech through the mandatory checkoffs must be given the highest level of scrutiny under the First Amendment. The compulsion to fund messages that promote a system of agriculture that is repugnant to farmers' and ranchers' economic, philosophical, and political interests must also be repugnant to the Constitution.

B. The Beef Checkoff, Paid Solely By Ranchers To Benefit The Beef Industry, Fails The *Central Hudson* Test.

Even if the speech at issue is deemed commercial, *Central Hudson* provides that the government may regulate it only if: (1) "the asserted government interest is substantial," (2) the regulation "directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Petitioners have failed to meet their burden under *Central Hudson*, which "is not satisfied by mere speculation

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[15] Although the Eighth Circuit concluded that the test for a restriction on commercial speech set forth in *Central Hudson* is applicable to the claims at issue in this case, it did so without analysis of the nature of the speech, and ultimately correctly applied *United Foods*. U.S. Pet. App. 24a-28a.

or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

1. The government's interest is not substantial.

Petitioners maintain that the beef checkoff advances a substantial governmental interest by "enhancing 'the welfare of beef producers' and other members of the $50 billion beef industry," and "stabilizing 'the general economy of the Nation.'" U.S. Br. 47, citing 7 U.S.C. § 2901(a)(3) and (4). Petitioners also cite *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), *cert denied*, 493 U.S. 1094 (1990) (O'Connor, J., not participating), for the proposition that the beef checkoff prevented the further decay of the beef industry. U.S. Br. 39-40. Petitioners are wrong for a number of reasons. First, the Third Circuit's recent decision in *Cochran*, a dairy checkoff challenge, limited its prior holding in *Frame* on this very issue:

> As in *Frame*, the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. . . . We previously have emphasized, however, that the Court's subsequent holding in *United Foods* that clarified and limited the teachings of *Glickman*, cut away the underpinning of this court's analysis in *Frame*. *United Foods* makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. . . . As Judge Sloviter suggested in her dissent in *Frame*, promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's.

359 F.3d at 279.

Second, it has long been accepted that checkoff programs were created as "self-help" programs to serve private industry

interests, rather than a governmental interest. *See id.*; J.A. 101-02; *MPPA* II, 348 F.3d at 161; *see also*, *Glickman*, 521 U.S. at 495 (Souter, J., dissenting) ("the legislative history shows that from time to time Congress has simply amended the [Agricultural Marketing Agreement Act of 1937] to add particular commodities to the list at the request of interest producers or handlers, without ever explaining why compelled advertising programs were necessary for the specific produce chosen and not others.").

Third, in discussing the importance of the beef industry to the American economy, Petitioners fail to mention that the government has other compelled speech programs that compete with beef. For example, the pork checkoff program has identified beef as being in competition with pork.[16] The lamb checkoff program compares the nutritional value of lamb to other meats, including beef and pork. American Lamb Board, *Nutrition: Lamb v. Other Meats*, *available at* http://americanlambboard.org/?page=site/text&nav_id=d04debdf9e79843987ec6352c78be6d2. CBB, through beef checkoff promotions, bragged that in 1999, for the first time in 20 years (in 15 of which the mandatory beef checkoff existed), beef consumption increased, "despite stiff competition from pork and poultry." CBB Press Release, *Beef Demand Stabilizes After 20-Year Slide* (Jan. 26, 2000), *available at* http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1071&contentTypeId=2&contentId=415. In addition to enacting numerous competing checkoff programs, Congress

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[16] NPB Press Release (June 18, 2001), *available at* http://www.porkboard.org/News/NewsEdit.asp?NewsID=101 ("With pork's increase in popularity, the industry continues to share the message that pork can compete with beef."); NPB Press Release (April 16, 2002), *available at* http://www.porkboard.org/News/NewsEdit.asp?NewsID=266 ("But with abundant supplies [of pork] and low prices for beef and poultry, there is bound to be some substitution."); NPB Press Release, (June 7, 2001), *available at* http://www.porkboard.org/News/NewsEdit.asp?NewsID=95 ("At the consumer level, pork competes with beef.").

also enacted the Commodity Promotion, Research and Information Act of 1996 that allows agricultural industry groups to petition the Secretary of Agriculture to implement new checkoff programs. 7 U.S.C. §§ 7411-7425. As the district court aptly queried: "After all, is the 'government message' that consumers should eat no other product [other than beef] or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal?" U.S. Pet. App. 56a.

In *Greater New Orleans Broad. Ass'n v. United States*, the Court held that a federal restriction on advertising related to casino gambling did not satisfy *Central Hudson*'s substantial governmental interest requirement in part because Congress also sanctioned some forms of gambling. 527 U.S. 173, 186-87 (1999). The Court held that it "cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General." *Id.* By authorizing multiple, competing checkoffs, Congress is not promoting the welfare of cattle ranchers; rather, it is promoting the interests of competing agricultural industry groups that are on the gravy train of checkoff funding. That interest does not justify compelled assessments' impingement on ranchers' First Amendment rights.

2. The beef checkoff does not directly advance any asserted government interest.

Even if a substantial government interest can somehow be derived amongst the multitude of checkoffs, the beef checkoff does not directly advance the asserted government interest to "enhance the welfare of beef producers." U.S. Br. 39-40. Presumably by this Congress meant American cattle ranchers. *See* 7 U.S.C. § 2901(a)(2). One of Respondents' primary objections to the beef checkoff is that it treats all beef the same, including imported beef, to the detriment of domestic ranchers. J.A. 35, 222-23. By doing so, the beef checkoff fails to directly advance the asserted government interest of enhancing the welfare of American ranchers.

Furthermore, the record in this case contains no evidence suggesting that the beef checkoff has a beneficial effect on the live prices ranchers receive when they market cattle (and are forced to pay the mandatory beef checkoff). Instead, the analysis cited by Petitioners is limited to changes in demand for beef. U.S. Br. 40. Ranchers sell cattle, not beef. Packers and retailers sell beef. If the beef checkoff has helped anyone, it is retailers and processors—who do not pay the beef checkoff. *See* U.S. Pet. App. 48a. The checkoff's failure to enhance the welfare of American cattle ranchers—indeed, its inherent inability to do so—precludes any finding that the compelled speech directly advances the government's asserted interest.

3. The beef checkoff is far more extensive than necessary to serve any asserted governmental interest.

By compelling objectionable speech, the beef checkoff burdens ranchers' First Amendment rights more than necessary to advance the asserted governmental interest. To be valid under *Central Hudson*, compelled speech must be the last means utilized to serve the asserted government interest. *See Thompson v. W. Med. States Ctr.*, 535 U.S. 357, 373 (2001) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try."). The government has available to it a vast array of strategies it can use and has used to promote the beef industry, short of violating ranchers' First Amendment rights.

If the government's interest in the welfare of cattle ranchers were substantial, and if the government truly believed that generic promotion programs directly advance that interest, the government could use funds from general revenues to fund the same projects, as the Fifth Circuit recently noted in a decision striking down a state alligator

checkoff.[17] *See Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 434 n.21 (5th Cir. 2004) *petition for cert. filed* (U.S. June 30, 2004) (No. 04-23). ("Louisiana does not need to compel alligator harvesters to support generic marketing, but could simply fund generic marketing from its general tax revenues."). Indeed, the government has funded projects to "enhance the welfare of beef producers" in the past and has proposed doing so in the current appropriations cycle.[18] For example, the Livestock Compensation Program provided government payments to farmers and ranchers based on losses sustained due to natural disasters. 67 Fed. Reg. 63,070 (Oct. 10, 2002).[19] In addition, the government's response to Bovine Spongiform Encephalopathy (BSE), or Mad Cow disease, has come from USDA taxpayer-funded programs and is not dependent on the existence of the beef checkoff.[20] In

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[17] The Court has recognized that constitutional interests outweigh any governmental interest in pecuniary savings. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 28 (1981) (explaining that although North Carolina's interest in pecuniary savings was legitimate, it could not overcome the Due Process rights of its citizens).

[18] In order to increase demand for beef, USDA's Agricultural Marketing Service has a Commodity Procurement Program that purchases beef. J.A. 128; 7 U.S.C. § 612c. Also, states have enacted agricultural commodity purchase programs. *See* Neil D. Hamilton, *Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 Drake J. Agric. L. 404, 424-27 (2002).

[19] The Small Hog Operation Payment program likewise provided small hog farmers payments based on past production in response to historically low hog prices in 1998 and 1999. 7 C.F.R. pt. 716. For dairy farmers, USDA's Milk Income Loss Contract program compensates dairy farmers when domestic milk prices fall below a specified level. 7 U.S.C. § 7982.

[20] For 2005, USDA has budgeted $60 million for BSE-related activities. *See* http://www.usda.gov/agency/obpa/Budget-Summary/2005/19.BSE.htm. The House and Senate also have both passed bills for additional BSE-related programs in the pending agricultural appropriations bills. *See* H.R. Rep. No. 584, 108th Cong. at 43, 51, 85 (2004); S. Rep. No. 340, 108th Cong. at 65, 81, 148 (2004).

any event, consumers are not protected by beef checkoff speech; they are protected by food and feed safety regulations that will prevent BSE. *See, e.g.*, 21 C.F.R. § 189.5; 69 Fed. Reg. 1,694 (Jan. 12, 2004). Also, NCBA opposes COOL, the law that would inform consumers which country beef comes from so they can avoid buying beef from cattle raised in countries where BSE has been detected. Petitioners' cries that the beef industry will collapse without the mandatory checkoff ring hollow in light of the facts.

Petitioners argue that the mandatory beef checkoff "solves the collective action problem by eliminating the possibility of free riding." U.S. Br. 40. In addition to the arguments at pages 15-17, *supra*, refuting Petitioners' unsupported free rider theory, there are other reasons why Petitioners' free rider argument is misplaced. Congress has demonstrated that the purported free rider problem does not exist in this context. For example, Congress does not always require every producer of a commodity to pay mandatory assessments for the commodity's promotion, research, and consumer information program. In 2002, Congress exempted all certified organic farmers, including organic cattle ranchers, from paying mandatory checkoff assessments. 7 U.S.C. § 7401(e). And some checkoff programs impose mandatory assessments only on producers and processors with a certain minimum annual production or acreage.[21] Oral

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[21] *See, e.g., Dairy Act*, 7 U.S.C. § 4502(l) (exempting dairy producers from outside the 48 contiguous states); *Fluid Milk Promotion Act*, 7 U.S.C. § 6402(4) (exempting fluid milk processors who process 3 million pounds or less per month); *Popcorn Act*, 7 U.S.C. § 7482(11) (exempting processors who process 4 million pounds of popcorn or less per year); *Honey Act*, 7 U.S.C. § 4606(e)(4) (exempting producers who market less than 6,000 pounds of honey per year); *Potato Act*, 7 U.S.C. § 2612(e) (exempting farmers who grow less than 5 acres of potatoes); *Watermelon Act*, 7 U.S.C. § 4902(5) (exempting farmers who grow less than 10 acres of watermelons); and *Blueberry Order*, 7 C.F.R. § 1218.53 (exempting growers who produce less than 2,000 pounds of cultivated blueberries per year).

Argument Tr., *United States v. United Foods, Inc.*, No. 00-276, 16, ll. 3-7 (Apr. 17, 2001) (counsel for United States) (conceding that the mushroom checkoff is not imposed "on all those who benefit from the speech."). This means that, for each of these checkoff programs, there are "free riders," in Petitioners' parlance.

By exempting certain categories of producers and processors from compelled financial support of promotion programs—programs whose benefit, if any, presumably inures to the non-paying producers and processors of the commodity as well as the paying contributors—Congress has shown that avoiding a free rider problem is not of paramount concern under the checkoff programs. Specifically for this case, Congress's willingness to exempt organic ranchers from paying the beef checkoff reveals its belief that the program's intended benefits are attainable without the financial support of all ranchers. If not all are needed, Petitioners' general free rider argument thus falls flat and the mandatory beef checkoff cannot meet the Court's test that any regulation be "narrowly tailored to achieve the desired objective." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001). The true free rider problem under the beef checkoff is that only one segment of the beef industry—the cattle rancher—is forced to pay the checkoff to support a program that is intended to "strengthen the position of the beef industry in the marketplace." 7 U.S.C. § 2901(b); *see also* U.S. Br. 41 ("[The Beef Act] requires only that cattle producers contribute financially to generic advertising (and other activities) designed to benefit the beef industry as a whole by promoting the sale of the product that the industry exists to market."). Since the burden of the beef checkoff falls only on ranchers, while the benefits accrue largely, if not entirely, to other participants in the industry—the marketer, meatpacker, food retailer—Petitioners cannot claim that the Beef Act is "not more extensive than is necessary."

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondents' Brief, the judgment below should be affirmed.

Respectfully submitted,

Susan E. Stokes
Counsel of Record
David R. Moeller
Karen R. Krub
FARMERS' LEGAL ACTION GROUP, INC.
360 North Robert Street, Suite 500
Saint Paul, MN 55101
(651) 223-5400

Dated: October 15, 2004*

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* Counsel for *Amici* were assisted by Farmers' Legal Action Group Staff Attorney Jess Anna Speier.

APPENDIX

List of *Amici*

1. American Agriculture Movement
2. American Corn Growers Association
3. American Raw Milk Producers Pricing Association
4. Citizens Action Coalition of Indiana
5. Dakota Resource Council
6. Dakota Rural Action
7. Empire State Family Farm Alliance
8. Family Farm Defenders
9. Farm Wives United
10. Federation of Southern Cooperatives
11. Fort Berthold Land and Livestock Association
12. Idaho Rural Council
13. Illinois Farmers Union
14. Illinois Stewardship Alliance
15. Indiana National Farmers Organization
16. Intertribal Agriculture Council
17. Iowa Citizens for Community Improvement
18. Iowa Farmers Union
19. Kansas Cattlemen's Association

20. Kansas Rural Center
21. Land Stewardship Project
22. Minnesota Farmers Union
23. Minnesota National Farmers Organization
24. Missouri Farmers Union
25. Missouri Rural Crisis Center
26. Missouri Stockgrowers Association
27. National Catholic Rural Life Conference
28. National Family Farm Coalition
29. National Farmers Organization
30. National Farmers Union
31. Nebraska Farmers Union
32. Northern Plains Resource Council
33. Northern Plains Sustainable Agriculture Society
34. Oregon Farmers Union
35. Pennsylvania Farmers Union
36. Powder River Basin Resource Council
37. Rocky Mountain Farmers Union
38. Rosebud Indian Land and Grazing Association
39. Rural Advancement Foundation International-USA
40. Rural Coalition
41. Rural Vermont

42. South Dakota Stockgrowers Association
43. Southern Sustainable Agriculture Working Group
44. Sustainable Agriculture Coalition
45. Western Colorado Congress
46. Western Sustainable Agriculture Working Group
47. Wisconsin Farmers Union
48. Women, Food and Agriculture Network
49. Yahara Food Farm Coalition

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IN THE

Supreme Court of the United States

VENEMAN, *ET AL.*, *Petitioners*,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*, *Respondents*.

NEBRASKA CATTLEMEN, INC., *ET AL.*, *Petitioners*,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* JEANNE and STEVE CHARTER, GERAWAN FARMING, INC., DELANO FARMS CO., GRAVES BROTHERS CO. and SEVEN OTHER FLORIDA CITRUS GROWERS, and CRICKET HOSIERY, INC. and FIVE OTHER COTTON IMPORTERS, IN SUPPORT OF RESPONDENT

RENEE GIACHINO
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street
Alexandria, VA 22314

KELLY J. VARNES
HENDRICKSON, EVERSON, NOENNIG & WOODWARD, P.C.
208 North Broadway
Billings, MT 59103-2502

MICHAEL P. MCMAHON
VIRGINIA B. TOWNES
AKERMAN, SENTERFITT
P.O. Box 231
Orlando, FL 32802-0231

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612

JAMES A. MOODY
1101 30th Street, NW
Washington, D.C. 20007

STEVEN B. GOLD
111 Ponce de Leon Avenue
Clewiston, FL 33440

Counsel for Amici Curiae

October 15, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

INTEREST OF *AMICI CURIAE* [1]

Steve and Jeanne Charter are independent Montana ranchers subject to assessments under the Beef Act. Because they have strongly held views regarding ranching, nutrition, food safety, and marketing that are considerably different – and often diametrically opposed – to the views expressed by checkoff-funded speech, they challenged the constitutional validity of the Beef Act and the resulting beef checkoff. That challenge is now pending before the Ninth Circuit, *Charter* v.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. None of the corporate *Amici* have any parent companies and no publicly traded company owns 10% or more of any of their stock.

USDA, No. 02-36140 (CA9) (argued March 31, 2004), and is being held for the outcome in this case.

Gerawan Farming, Inc., is a family-owned grower-shipper of peaches, nectarines, plums, and table grapes. Gerawan has filed an administrative challenge at USDA to the mandatory assessments imposed under federal marketing orders for peaches and nectarines. It also has challenges to the mandatory fee imposed under state marketing orders for plums and grapes pending in the California courts. *See Gerawan Farming, Inc.* v. *Kawamura*, 33 Cal.4th 1 (2004). Gerawan, whose annual assessments for the four commodities are approximately $750,000, is opposed all mandatory speech assessments. For example, it opposed the nectarine and peach fees for ideological (government should not interfere with its right to choose speaker and message), ethical (the group-determined messages are largely false with respect to its fruit), and practical reasons (investment of significant resources in know-how, technology, and the Prima brand name to distinguish Gerawan fruit from the "rest" of the industry).

Delano Farms Company, a Washington corporation, is subject to speech assessments to support the California Table Grape Commission. Delano objects to the generic messages of the Commission, with which it does not wish to be affiliated, because they falsely group Delano's superior grapes with the mediocre product of the rest of the industry. Delano has challenged the program as a violation of both the state and federal Constitutions. The Ninth Circuit recently held in *Delano Farms* v. *California Table Grape Commission*, 318 F.3d 895 (CA9 2003), that the fees violated the First Amendment.

Graves Brothers Co., Evans Properties, Inc., Southern Gardens Groves Corp., The Latt Maxcy Corporation, Fellsmere Joint Venture, Oak Hammock Grove, Ltd., Silver Strand III and Barron Collier Partnership are Florida citrus growers subjected to assessments on every box of citrus they produce. The assessments finance the Florida Advertising Trust Fund

established by Section 601.15, Florida Statutes, to generically promote citrus. They have challenged the validity of the Florida statute, which has been held unconstitutional in *Graves Bros. Co.* v. *Florida Dept. of Citrus*, Case Nos. GC-G-02-4686, GC-G–03-0281 (Fla. 10th Jud. Cir., Polk County 2003), *appeal pending*. They object to the generic promotion of citrus for a variety of reasons. All object because the advertising is acknowledged to promote their competitors, including cheap imported Brazilian frozen orange juice and citrus grown in Texas and California. Further, they object to generic promotion which benefits frozen orange juice, because pasteurized juice not-from-concentrate is their profitable market. Individually, Graves Brothers Co. has established its "Orchid" brand for fresh grapefruit and would like to expand that brand to grapefruit juice, but the box tax is as much or more than its profit margin on grapefruit used for juicing. Fellsmere Joint Venture objects on moral grounds to the promotion of grapefruit juice as a mixer for alcoholic drinks, and it considers it reprehensible to promote such television programming as "Sex And The City." Further, it believes that generic advertising is harmful to the promotion of the "Ocean Spray" brand of its voluntary cooperative. They believe that by encouraging cheap imports, generic promotion contributes to low pay for agricultural workers and other adverse social and environmental consequences in their local rural communities.

Cricket Hosiery, Inc., The William Carter Co. (publicly traded), and Artex International, Inc., are named plaintiffs in a class action filed in the Court of International Trade seeking a refund of the cotton fee. *See Cricket Hosiery, Inc.* v. *United States*, 2004 WL 1376402 (CIT, Jun 18, 2004). Revman Industries, Michael Simon Designs, Inc., and Tru 8, Inc., d/b/a Arriviste, have filed follow-on complaints in that Court. Those companies import products made of cotton and cotton blends, and as such were forced to begin paying the cotton fee in 1992. They in turn sell their products to the retail and insti-

tutional trade, and thus have no interest in supporting the retail advertising of the Cotton Board, with which they disagree and which is actually adverse to their products.

SUMMARY OF ARGUMENT

1. Treating *dicta* as holdings and holdings as meaningless, the government seeks an unprecedented – and constitutionally offensive – immunity from First Amendment review of compelled support for domestic propaganda. It claims such immunity *because* it has discriminated in favor of particular content and viewpoints, *because* it has conscripted private parties, including dissenters, to pay for and disseminate such propaganda, and *because* it exercises censorial control over the content of such propaganda in order to promote the "image" of beef. That approach turns the First Amendment on its head. It seeks a license for government to *compel* support for speech whenever the free marketplace of ideas fails to yield adequate support for a favored government viewpoint. But the failure of all members of an industry to support particular viewpoints espoused by others is not a market failure and is not free riding, it is *dissent*. To respond to such dissent by forcing the dissenters to support competing speech anyway is nothing short of a First Amendment abomination, regardless whether the eventual speech is characterized as private collective speech or government speech. Compelled support for government speech is no less an offense to the First Amendment than compelled support for third-party speech. The government's authority to *act* in a manner contrary to the views of a minority does not immunize compelled support for government speech from the First Amendment because *speech is different* and subject to greater constitutional protection than non-speech conduct.

2. The proper approach to analyzing viewpoint-discriminatory compelled support for speech is set out in the *Abood/Keller/United Foods* line of cases and should be the same regardless how the ultimate speaker is characterized.

While government speech tied to non-speech government programs generally will survive such analysis, domestic propaganda aimed at manipulating public opinion and unnecessary to the functioning of any non-speech government activity generally will fail. That is the proper approach, yields reasonable outcomes, and is faithful to this Court's *holdings* and to bedrock First Amendment principles.

ARGUMENT

I. COMPELLED SUPPORT FOR GOVERNMENT SPEECH SHOULD BE SUBJECT TO THE SAME FIRST AMENDMENT SCRUTINY AS COMPELLED SUPPORT FOR OTHER SPEECH.

Where individuals are compelled to subsidize the expression of viewpoints with which they disagree, the First Amendment test should be the same regardless whether the speaker being subsidized is a third party chosen or appointed by the government or the government itself. Government speech would be permissible if it were necessary and incidental – *i.e.*, germane – to a non-speech government program and met the other requirements of the test set out by cases from *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n. 13 (1977), to *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). Such an approach will not hamstring the legitimate functioning of the government given that much government speech easily would survive First Amendment scrutiny. But government speech conducted for its own sake or not integral to the operation of a government program would be unconstitutional. In this case, the *United Foods* analysis should be the same regardless of how the speech is characterized, and the Beef Act readily fails such analysis.

Amici, of course, recognize that there is considerable language from this Court's opinions suggesting more lenient treatment for government speech than for compelled support

for non-government speech. Such occasional language, however, is entirely *dicta*, and has never been adopted in a holding of this Court.

A. The Parameters of Government Speech.

Government speech comes in many forms and arises in many contexts. It may involve primarily factual speech concerning the government's own activities, such as laws it enacts or the annual budget. It may involve factual speech about other persons, things, or events, such as economic data, scientific research, or weather reports. Or it may involve advocacy on topics ranging from government programs, public conduct, or, as in this case, agricultural commodities. It is primarily the latter category of advocacy – or, more accurately, domestic propaganda – seeking to manipulate the public's views that is at issue here.

In addition to the various types of government speech, there are various modes by which the government speaks. It may speak through its officers and agents, through administrative officials, through official publications, or through the purchase or donation of third-party communications services such as advertising. The means by which the government purports to speak may have significant ramifications for First Amendment analysis and may sometimes mix government speech with private speech, adding further complications.[2]

Finally, the government may be acting in different capacities in different cases, with material consequences for First Amendment analysis. For example, the government may act as employer, it may act as market participant in the sale of

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[2] Speech by individuals within government, for example the President, Senators, or Representatives, may not be "government" speech at all, but rather individual speech. When an elected official communicates with constituents or campaigns for re-election, such speech is not on behalf of the government itself, but rather on behalf of the individual office-holder. The communication that occurs by the component members of government regarding their jobs is not the type of speech at issue in this case.

goods and services, it may act as sovereign speaking to its own citizens, it may act as sovereign speaking to the international community, or it may act in some mixture of those roles. Just as with restrictions or prohibitions on speech, the governmental role will alter the First Amendment analysis of government speech. *See Connick* v. *Myers*, 461 U.S. 138 (1983) (speech restrictions by government as employer). But recognizing the necessity and acceptability of speech in one context does not, *a fortiori*, establish the propriety of government speech in all contexts any more than permissible speech restrictions in the workplace justify like restrictions on the public at large.

The point of this extended taxonomy is simply to show that government speech is a complex and heterogeneous issue that should not be determined on the basis of broad generalities about government speech made in past *dicta*. This Court should focus carefully upon the particular type of government speech allegedly at issue here – viewpoint-discriminatory compelled support for speech directed at manipulating public opinion. It is not necessary to rule on other forms of government speech or to give undue deference to the speech here out of concern for speech in some other circumstance that may well raise different issues. The government's reliance on undifferentiated statements of support for government speech is overly simplistic and has a tendency to wash over potentially material distinctions within the menagerie of government speech.

In this case, even assuming *arguendo* that beef promotion involves government speech at all, this Court is addressing viewpoint-discriminatory advocacy through the use of a targeted exaction to coerce resources from a limited segment of the public, targeted at the general citizenry in order to manipulate their views in a manner preferred by portions of the beef industry and favored by the government. This case thus does *not* involve speech or advocacy by individual officials within the government or by the government as market par-

ticipant, but rather an off-budget diversion of private resources obtained through the coercive power of government in its role as sovereign.[3] Furthermore, the issue in this case at best involves government advocacy and persuasion, and not the very different issue of government publication of information.[4] As presented in this case, therefore, the question is simply whether the government *qua* government may use its power to divert resources into viewpoint-specific advocacy that seeks to alter public opinion in a direction preferred by the government.

B. This Court Has Never Immunized All Government Speech from the First Amendment.

Contrary to the government's repeated assertions and distortions, this Court has never held that government speech is immune from First Amendment scrutiny. Indeed, the various cases the government cites for the proposition that the First Amendment "does not place any limit on the government's own speech" in fact say no such thing. Pet. Br. 15-16. In each of those cases the issue of government speech was irrelevant to the holding and hence the incidental commentary regarding government speech was entirely *dicta*. In *Board of Regents of the University of Wisconsin System* v. *Southworth*,

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[3] As a simple example, if Congress were to appropriate a million dollars to buy a television advertisement saying "Please support the expansion of prescription drug benefits" or "Please support the war against Iraq," that would be government advocacy. By contrast, if individual Senators or Congressmen were to hold a press conference and announce their support for Medicare expansion or the Iraqi war, that would not be government speech notwithstanding that the speakers are government officials.

[4] In many instances the government is required to provide information to the public, for example, the publication of any new laws it has passed. Similarly, publication of economic data raises different questions from attempts to persuade the public to a particular viewpoint. While the line between information and advocacy may sometimes blur, this case presents a clear issue of government advocacy – literally "promotion" – intended to change public views of and desire for beef.

for example, the University expressly disavowed any government-speech defense, leading this Court to state that the "University having disclaimed that the speech is its own, we do not reach the *question* whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." 529 U.S. 217, 229 (2000) (emphasis added). Any commentary on the government's purported right to advocate its policies was admittedly unnecessary to the decision and thus classic *dicta*.

In *Rosenberger* v. *Rector & Visitors of the University of Virginia*, this Court squarely rejected the notion that the University itself was speaking or subsidizing its own preferred message and instead held that the University was "expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S. 819, 834 (1995). Once again, commentary concerning what rules might apply to government speech was unnecessary to the decision and advisory.[5]

In *Keller* v. *State Bar of California*, this Court referred to the respondent's argument as the "so-called 'government speech' doctrine" and then squarely held that the speech at issue was not government speech and thus "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. 1, 12-13 (1990). Any discussion in *Keller* about possible immunities for government speech was, again, simply *dicta*.

Finally, in *Legal Services Corporation* v. *Velazquez*, 531 U.S. 533, 540-43 (2001), the opinion repeats much of the

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[5] The government's citation, at 19, to a concurring opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment), is self-evidently non-authoritative, as are its citations, at 16, 26, to the concurring commentary in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring in the judgment), and *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment).

dicta from *Southworth* and *Rosenberger*, but notes that the legal services program at issue "was designed to facilitate private speech, not to promote a governmental message," *id.* at 542, thus making such discussion *dicta* as well.

The essential point here is that this Court has *never held* that government speech is immune from First Amendment scrutiny. Such *dicta* as has appeared in various opinions from this Court was written without benefit of a genuine adversarial clash on the issue and thus should not be relied upon as authoritative now that there is full briefing on the issue.

C. Compelled Support for Speech Should Receive the Same First Amendment Scrutiny Regardless of Speaker.

It is useful to review some bedrock First Amendment principles when considering whether compelled support for government speech – as opposed to government conduct – is subject to lesser or no First Amendment scrutiny.

It is a central First Amendment principle that the "freedom of speech" includes the complementary freedoms from both the restriction and compulsion of expression. As this Court recognized in *Riley* v. *National Federation of the Blind*, while "[t]here is certainly some difference between compelled speech and compelled silence, * * * in the context of protected speech, *the difference is without constitutional significance*, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." 487 U.S. 781, 796-97 (1988) (emphasis added). In *Abood*, the Court likewise recognized such First Amendment equivalence as to monetary contributions in support of expression, holding that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works *no less an infringement* of their constitutional rights." 431 U.S. at 234 (emphasis added).

The fundamental objection to government regulation of speech – whether by prohibition or by compulsion – is that it coercively manipulates public opinion:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government ... pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information *or manipulate the public debate through coercion rather than persuasion.*

Turner Broadcasting Sys., Inc. v. *FCC*, 512 U.S. 622, 641 (1994) (emphasis added). At issue in this case is precisely such an attempt to manipulate public opinion through coerced support for domestic propaganda designed to give beef a government-favored "image." Pet. Br. at 3. While the government certainly has the authority to take numerous *actions* based upon prevailing points of view, such authority does not extend to manipulating public opinion. Rather, "[a]uthority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641 (1943).

The concern that public opinion – the "public mind" – remain free from manipulation by the government retains force regardless whether such manipulation is attempted by restriction or compulsion of speech:

> The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. * * * "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners;

> free and robust debate cannot thrive if directed by the government.

Riley, 487 U.S. at 790-91. Tilting the playing field of ideas, whether through compelled subtraction or compelled addition of particular viewpoints, necessarily clashes with the First Amendment. Even absent complete suppression of particular views, the First Amendment is offended by efforts to skew public debate. *See, e.g., First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-86 (1978) (where speech restriction "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted).[6]

With those basic First Amendment principles in mind, we can examine the *dicta* cited in support of the government speech doctrine. One such passage comes from *Southworth*:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. *See, e.g., Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 548-549 (1983).

529 U.S. at 229. But noting that it "seems" inevitable for the government to speak in support of its substantive programs

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[6] The First Amendment offense of attempting to skew public debate through coerced allocation of greater resources to speech in support of a favored viewpoint is a complete answer to the government's observation that it does not prohibit ranchers from speaking out contrary to the generic messages promoted in this case. Pet. Br. at 10.

does not mean that every instance of government speech is inevitable or acceptable. Furthermore, even *Southworth*'s restrained suggestion of a *potential* government-speech doctrine turns on a mistaken parallel between government conduct and government advocacy. The error in that *dicta* is that it overlooks the constitutional fact that *speech is different* from conduct, and the government may not act in the speech arena as freely as it may with regard to conduct.

That is the essential lesson of the First Amendment. Indeed, the very existence of that difference is both the substantive assumption and the legal consequence of the First Amendment. While the government may certainly adopt controversial policies opposed by a current minority, it may not properly use its coercive power to tilt the marketplace of ideas to ensure continued public support for its programs or to counter a current minority's efforts to change public opinion. Government's role is to obey the changing popular will, not to play rearguard to give permanence to a temporal majority viewpoint.[7]

In the end, the relevant constitutional equivalence is not between government conduct and government speech, but rather between government speech and government-coerced support for third-party speech. The latter two raise the same concerns of government manipulation of the marketplace of ideas, viewpoint discrimination, and compelled support for objectionable advocacy. As Justice Scalia has observed regarding viewpoint discrimination in government *support* for third-party speech, to instead have speech "directly involving

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[7] The notion that it is "the very business of government to favor and disfavor points of view," *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment), is correct insofar as favored views are implemented through regulation of *conduct* rather than speech. But it is surely *not* the business of government to use its coercive powers to compel support for *speech* in order to shape the public's views (or worse yet, entrench a currently fashionable view) rather than respond to such views as they evolve without governmental manipulation.

the government itself in viewpoint discrimination (if it is unconstitutional) would make the situation even worse." *Finley*, 524 U.S. at 598 (concurring in the judgment). That the government, at 16, 19, repeatedly relies upon Justice Scalia's concurrence in *Finley* is particularly misleading given its failure to cite that fundamental predicate of Justice Scalia's opinion and given that this Court *has* imposed significant First Amendment limits on such discrimination in the subsidies and compelled-support contexts. Because direct government speech "would make the situation even worse," such limits likewise must apply to government speech.

One of the most telling arguments in favor of First Amendment limits on government speech comes indirectly from Justice Scalia, who allows that "it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party" and that "it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party," though he denies that such "unconstitutionality has anything to do with the First Amendment." *Finley*, 524 U.S. at 598 n. 3 (concurring in the judgment). But no other source of unconstitutionality is readily apparent. And other Justices who have recognized constitutional difficulties with such openly partisan government speech have expressly identified the First Amendment as the source of those difficulties. *See International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting) (quoting the First Amendment and then stating: "Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very

reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands."); *Lathrop* v. *Donohue*, 367 U.S. 820, 853 (1961) (Harlan, J., concurring in the judgment) (agreeing that neither a state nor the federal government could "'create a fund to be used in helping certain political parties or groups favored' by it 'to elect their candidates or promote their controversial causes'" (quoting *Street* dissent)).

As with much of the *dicta* regarding government speech, the government here cites to *Rust* v. *Sullivan* for the supposed proposition that the government can freely choose what speech it will fund. *See* Pet. Br. 15-16; *see also Southworth*, 529 U.S. at 229; *Finley*, 524 U.S. at 597 (Scalia, J., concurring in the judgment). In *Rust*, however, the issue of government speech was not necessary to the decision. Indeed, this Court has recently recognized that *Rust* did not rely upon a claim that the government-financed medical activities at issue constituted government speech. *Velazquez*, 531 U.S. at 541; *see also id.* at 554 (Scalia, J., dissenting) (noting that the speaker in *Rust* was not the government). *Rust*'s observation about the government's ability to choose "to fund one activity to the exclusion of" another, 500 U.S. at 193, seems to view the activity in question as conduct, and does not address the different issues raised by the viewpoint-discriminatory funding of speech. But *speech is different*.[8]

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[8] Even if the medical services funding addressed in *Rust* were viewed as support for mixed speech and conduct, it would fit neatly into the analytic paradigm suggested here. The program in *Rust* thus might well survive the germaneness analysis insofar as the only speech authorized was that necessary to provide the medical *services* being funded. Indeed, because Title X funds could not be used to *provide* abortion services, speech promoting such services arguably would not have been germane to the *conduct* properly funded by the government, and hence the government's own limitation on what speech it would support was entirely consistent with the First Amendment principles in this area.

Another common argument in favor of a government speech doctrine is to cite the National Endowment for Democracy as evidence of the government's authority to engage in viewpoint discriminatory speech. This Court in *Rust*, for example, assumed that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." 500 U.S. at 194; *see also Finley*, 524 U.S. 597 (Scalia, J., concurring in the judgment) (citing *Rust*); *cf. Lathrop*, 367 U.S. at 857 (Harlan, J., concurring in the judgment) (speculating on propriety of using tax funds for United States Information Agency propaganda that might offend some taxpayers).

But pro-democracy propaganda funded by general revenues and directed at other countries is readily distinguishable from propaganda aimed at a domestic audience and financed through compelled contributions from a discrete group. Outward-directed propaganda serves far more legitimate national interests and raises far fewer concerns than does inward-directed propaganda. Furthermore, speech promoting basic constitutional structures even in the United States would very likely pass First Amendment scrutiny as integral to the operation of those very same structural components of our democracy. Were such domestic advocacy to take on a partisan slant, however, there would be grave doubt regarding its constitutionality, regardless whether the United States may use advocacy to promote a partisan agenda abroad.

In a similar vein, course selection at public universities may pose a unique situation requiring somewhat different analysis than government advocacy to the public at large. Both *Southworth* and *Rosenberger* appear to have been moved to comment on government speech in order to dispel any implication that public universities might somehow be constrained in selecting their offerings or that academics

might somehow be forced to offer viewpoint-neutral courses. That concern is legitimate, but does not support a government speech doctrine untethered to the unique concerns of the university environment, the voluntary nature of attendance at such universities, and the fee-for-service nature of tuition payments. But a public university's potential claims to being a market participant in the educational context, its traditions of academic freedom and independence, and the ready choice among a variety of schools within the public system offer no support for the type of government advocacy at issue in this case, which shares none of those distinguishing features.

Finally, this case does not raise the same practical issues as when government acts in a proprietary manner as a consumer of, for example, art to put up in its own buildings, where it might sensibly be given greater leeway than if it were purchasing art to inculcate a particular viewpoint among the public. Government as a consumer of labor in support of valid government activities also poses no concerns comparable to those in this case. "Join the Army" is perfectly valid government speech that is integral to the valid government *activity* of raising an army, and thus readily survives First Amendment scrutiny. Likewise, when the government is selling some product – surplus typewriters or confiscated vehicles perhaps – the First Amendment would pose no obstacle to its advertising just as any other seller would. Such speech would be incidental to the accomplishment of permissible government conduct and is fairly necessary to such conduct.[9]

Regardless whether there are sufficient political checks on other forms of conduct by the government, First Amendment protection of the freedom of speech is not subservient to such political processes:

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[9] Indeed, if the government actually did collectivize the beef industry and itself purchased all cattle for resale then promotional advertising incidental to the government's sale of such goods would be acceptable, assuming the underlying collectivization was valid.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. If political checks are inadequate to replace the First Amendment where the government chooses to compel a dissenting minority to support third-party speech, there is no reason why such checks suffice when the government avoids the middleman and coerces minority support for the same speech out of the government's mouth. In both instances the First Amendment should provide the same protection and the same heightened scrutiny.

D. Even a Lower Level of Scrutiny for Government Speech Generally Cannot Sustain the Compelled Support for Speech in this Case.

Even assuming, *arguendo*, that government speech receives more lenient treatment under the First Amendment, this Court's *dicta* on the subject does *not* suggest that such speech receives a free pass. Rather, it merely poses the "question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections" to a program claimed to be government speech. *Southworth*, 529 U.S. at 229. But the Beef Act would fail even such lenient scrutiny examining the adequacy of political checks.

In numerous ways, the Beef Act and its implementation undermine traditional political checks on government behavior. The Beef Act insulates itself from any true political check by the citizenry as a whole by compelling private off-budget funding, rather than providing structurally checked

government funding. Such circumvention of ordinary fiscal checks and balances reduces any direct incentive for taxpayers to scrutinize the program and eliminates the role of House appropriations in the ongoing existence of the checkoff. Indeed, the government essentially concedes its circumvention of ordinary political checks by claiming – as if it were a point in *favor* of the Beef Act – that were the program funded by general revenues it would lose political support. Pet. Br. 29, 41.

Finally, by regulating speech alone, rather than as an incident to implementing some direct control over conduct, the government eliminates the political check of public resistance to government "intrusiveness." *Cf. United States* v. *Frame*, 885 F.2d 1119, 1122 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (congressional statements claiming to be avoiding intrusive government regulation and leaving matters up to the beef industry). While regulation of conduct may be more "intrusive" in the colloquial sense, it is the very burden of such regulation that ensures an adequate political check on its adoption. Given such an inherent check, conduct regulation is only subject to rational basis scrutiny and hence is considered minimally intrusive on *constitutional* concerns. Regulations or compulsions of speech may well be less intrusive in a colloquial sense than conduct controls, but it is precisely such *seeming* innocuousness that undermines ordinary political checks as would limit conduct regulation. The lesser effectiveness of political checks on speech regulation, however, requires heightened judicial scrutiny under the First Amendment, in recognition of the fact that such regulations are in fact *more* intrusive on constitutional values. It is the insidious nature of controls on speech that requires a constitutional, rather than a political, check on such controls.

II. CONGRESS MAY NOT COMPEL SUPPORT FOR SPEECH THAT IS NOT INTEGRAL TO OTHERWISE PERMISSIBLE COMPELLED CONDUCT.

Whether viewed as compelled support for government speech or collective private speech, the First Amendment requires substantial scrutiny of the Beef Act. As this Court recognized in *United Foods*, the proper test in a compelled-support case comes from the *Abood/Keller* line and requires, as a threshold matter, that a speech compulsion must be "germane" not to itself, but rather to the accomplishment of *some other action* that Congress has properly required. In this case, the stand-alone speech compulsion serves only itself, is not necessary and incidental to implementing other conduct that Congress has required, and thus violates the First Amendment.

A. Compelled Speech Is "Germane" Only When It Is Necessary and Incidental to Engaging in Conduct Otherwise Properly Compelled.

The "germaneness" test was developed in the context of compelled contributions to labor unions and integrated bar associations. *See Abood*, 431 U.S. at 236 (contributions may be compelled for "collective-bargaining activities," but "such compulsion is prohibited" for "ideological activities unrelated to collective bargaining"); *Keller*, 496 U.S. at 16 ("Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."). In *Lehnert* v. *Ferris Faculty Association*, the applicable standards for the use of compelled contributions in the union context were summarized as follows:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the govern-

> ment's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991). That description identifies the germaneness inquiry as relating to specific conduct and as separate from the government's "policy interest" or motive in adopting the legislative scheme in the first instance. It also establishes two additional components that even "germane" compelled support for speech must satisfy in order to be valid.

In *Board of Regents of the University of Wisconsin System* v. *Southworth*, however, this Court recognized that even in the more familiar context of labor unions, it has "encountered difficulties in deciding what is germane and what is not." 529 U.S. 217, 232 (2000); *see also Keller*, 496 U.S. at 15 ("Precisely where the line falls * * * will not always be easy to discern. But the extreme ends of the spectrum are clear."). *Amici* suggest that it would be appropriate to clarify that test and confirm that the germaneness of compelled support for speech must be measured against some underlying compelled conduct that cannot be accomplished without a certain amount of speech incidental to that conduct. That clarification of the germaneness test is consistent with the *Abood* line and with First Amendment jurisprudence relating to restrictions on mixed speech and conduct.

Over the long line of labor cases, this Court has identified specific economic conduct – negotiation and implementation of collective bargaining agreements – as both the permissible purpose of compelled support and the relevant *object* of the germaneness analysis. Thus, in *Railway Employees' Department* v. *Hanson*, this Court held that compelled "financial support of the collective-bargaining agency" does not violate the First Amendment but noted that "a different problem would be presented if the assessments were "imposed for purposes not germane to collective bargaining." 351 U.S.

225, 236, 238 (1956). In *Abood*, this Court followed *Hanson* "insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. But this Court agreed with appellants there that a union could not, over objection, spend compelled service fees on speech "unrelated to its duties as exclusive bargaining representative." *Id.* at 234. And where the relation between particular speech and the "process of establishing a written collective-bargaining agreement" was uncertain, the Court suggested that the relevant inquiry would be whether the context of the speech "*might be seen as an integral part of the bargaining process.*" *Id.* at 236 (emphasis added); *cf. Ellis* v. *Railway Clerks*, 446 U.S. 435, 448 (1984) ("the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues").[10]

By contrast, speech regarded as non-germane was not integral to the primary conduct being compelled. While such speech may have been relevant to the overall *goal* of the program – and hence germane in the colloquial sense – it was not essential to the required conduct itself and thus was analyzed distinctly from such conduct. For example, in *Lehnert* this Court held that generic promotional advertising by the union was not "germane" to collective bargaining because it was not a necessary element of such bargaining.

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collec-

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[10] While the collective bargaining process nominally involves speech, it is actually more a series of speech-acts – such as offers and acceptances – constituting the commercial transaction of contracting with the employer. Similarly with communications from the union to the employer and to the employees, those constitute the necessary elements of representation without which the union could not bargain, resolve grievances, or exchange information with those to whom it owes a duty of representation.

> tive-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

500 U.S. at 528-29 (Blackmun, J., for four Justices). That such promotion might have advanced the general interests of the teaching profession collectively was insufficient to render such promotional activities "germane." Rather, any permissibly chargeable speech had to be far more closely tied to the actual conduct – collective contract negotiation and administration – being compelled in the first place.

This construction of the germaneness test is consistent with, and in effect the compulsion flip-side of, this Court's cases involving restrictions on mixed speech and conduct. For example, in *United States* v. *O'Brien* the law forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. 391 U.S. 367, 376 (1968). The law in *O'Brien* was upheld where the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than is essential" to accomplishing the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id.* at 377. In like manner, the germaneness test allows some burden on speech arising from compelled support of conduct where the speech burden is incidental and no greater than essential to achieve the otherwise properly compelled conduct. And finally, as in *O'Brien*, the purposes and effect of government-compelled contributions must be imposed for the "noncommunicative impact of [the supported] conduct, *and for nothing else.*" *Id.* at 382; *see also id.* at 381-82 ("both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct").

As clarified and read in light of cases such as *O'Brien*, the germaneness test is an appropriate means of addressing the problem of compelled support for mixed speech and conduct. It is also a test that the government fails in this case.

B. Compelled Beef Advertising Is Not Integrally Tied to Compelled Conduct.

While the government here does not even attempt to satisfy the *Abood/Keller* test, various of its *amici*, and the government itself in its various litigation with the *Amici* on this brief, use as their primary dodge on the germaneness test the misidentification of the *object* of the test: that to which the speech compulsion must be "germane." Instead of the speech having to be germane to particular compelled conduct, the government claims the compulsion need only be germane to a government "purpose," defined at the highest possible level of generality as its "goal" or the "benefits" it hopes to achieve. But that formulation of the test is meaningless, and would fully eviscerate the germaneness requirement. Indeed, the compelled support for teacher promotional advertising rejected in *Lehnert* would satisfy the empty test proposed by the government, but eight members of the Court rejected such involuntary use of mandatory fees. The better test is that the speech must be tied to and in the service of some *conduct* that is the primary object of compelled support or collective activity. In this case there is no joint conduct such as collective bargaining to which the beef ads are integrally related and hence "germane."[11]

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[11] It would be a different – though not necessarily constitutional – situation if the marketing order also compelled the collective sale of all cattle through the Beef Board. Under such circumstances, advertising by the Board, and compelled support of such advertising, might be considered integrally related to the sale of cattle *by the Beef Board itself*, and would be germane in the *Abood* sense to the compelled *conduct* of collective sales of cattle. It would also be a different case if the marketing order gave credit for the separate promotional activity of the ranchers, thus allowing for choice in content and viewpoint while still providing a mecha-

Even if the same government "purpose" were thought to persist regardless of other regulation, it is only the *relationship* between such other regulation and the speech being compelled that serves to insulate incidental speech compulsions from the rigorous scrutiny applied to pure regulation of speech. That the government may have a "valid" purpose tells us nothing when that purpose is described at a sufficiently high level of generality, and it is beside the point in any event. Virtually any censor could describe their purpose with sufficient abstraction to render it "legitimate" in the sense that it would support government action in the non-speech arena under the rational basis test. But the First Amendment demands more. It is not the purpose, but the "means" of accomplishing that purpose that is most often the subject of dispute in a First Amendment case, and this case is no different. *Cf. Riley*, 487 U.S. at 791 (even "purest of mo-

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nism for cooperation among those with similar perspectives. Such a viewpoint-neutral approach avoids free-riders by effectively requiring that everybody do their fair share to build the cattle market, and would relate directly to the rancher's *own* sales of cattle, unlike generic ads by an entity not itself selling the commodity.

While petitioner Nebraska Cattlemen, Inc., rejects such funding of diverse views through advertising credits, its reason – that it would be less effective at conveying the generic message – highlights the constitutional offense. It will always be more effective to convey a particular viewpoint by forcing people to goose-step to the same message and by forcing competing speakers to support the favored viewpoint. But the First Amendment assumes and requires that viewpoints win their effectiveness through acceptance in a free marketplace of ideas, not through a market in which support for homogenized speech is compelled by the government. Those who would remain silent or would speak contrary to the government's preferences are not free riders or nuisances, they are *dissenters*. As such they are the very object of First Amendment concerns, and if a favored viewpoint is weakened by lack of support or by dissent, that is not a market *failure*, it is a *free* market where the choice of whether or how to speak is left to private individuals, not the government.

tives" do not allow government to "substitute its judgment as to how best to speak for that of speakers").[12]

The occasional claim that compelled support for speech merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions, mistakes the relative offensiveness of different types of government conduct. The First Amendment establishes that speech regulation is, by definition, more invasive in a constitutional sense than are other forms of regulation entitled to presumptions of validity under rational basis review. As this Court noted in *Barnette*:

> The right of a State to regulate, for example, a public utility may well include * * * all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.*

319 U.S. at 639 (emphasis added). That mere rationality is sufficient to regulate conduct but not speech simply highlights the point that *speech is different*.

The position taken by the government in justifying government speech as equivalent to government conduct, and by various *amici* in justifying compelled support for speech as a lesser-included component of the power to compel conduct, is reminiscent of the now-repudiated argument in *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico* that the power to ban conduct, even when unexercised, includes the supposedly "lesser" power to regulate speech concerning such conduct. 478 U.S. 328, 345-46 (1986). This Court has emphatically rejected that contention, holding that it is "well settled that the First Amendment mandates closer

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[12] Indeed, the First Amendment forbids government action that is presumed to be valid under the government's enumerated powers, for if it were beyond the government's powers to begin with, there would be no need to reach the First Amendment question at all.

scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, 193 (1999); *see also 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 510 (1996) (principal opinion) (rejecting contention "premised entirely on the 'greater-includes-the-lesser' reasoning endorsed toward the end of the majority's opinion in *Posadas*."). "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society." *Id.* at 512.

By manipulating public opinion, speech regulation is a much more insidious, intrusive, and effective means of controlling behavior than is the direct application of government fiat to individual conduct. *See 44 Liquormart*, 517 U.S. at 509-10 (principal opinion) (discussing *Posadas*: Puerto Rico's "advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw").[13] While Congress may well desire to avoid the political consequences of its programs and to hide their true costs, the First Amendment stands as a sound and sensible barrier to such political deception.

Finally, the notion that the benefits of the speech alone are sufficient to trigger the free-rider justification of the *Abood* line of cases, Pet. Br. 12, 30, independent of any group benefits from other substantive regulation, is mistaken and repugnant to the First Amendment. If the supposed benefits of the forced speech alone are sufficient to justify compelled collec-

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[13] Where people are free to think and speak, government regulation of conduct will be recognized for what it is, and accepted or opposed according to the strength of the arguments for and against the regulation. But where government tries to achieve the same regulatory result by altering the information flow and hence altering the way people think about an issue to begin with, there is less chance that the government's coercion will be seen for what it is.

tive speech, then there is nothing that would fail to satisfy that test. In any instance where the government elects to force speech at all, it plainly believes there is some benefit to that speech, and under the rational basis test proposed by the government, courts would rarely be in a position to say otherwise. But while "private speech often furthers the interests of non-speakers," the existence of such third-party benefits – *i.e.*, positive externalities – "does not alone empower the state to compel the speech to be paid for." *Lehnert*, 501 U.S. at 556 (Scalia, J., concurring in the judgment and dissenting in part).

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully Submitted,

RENEE GIACHINO
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street
Alexandria, VA 22314
(703) 535-5836

KELLY J. VARNES
HENDRICKSON, EVERSON, NOENNIG & WOODWARD, P.C.
208 North Broadway
Billings, MT 59103-2502
(406) 245-6238

MICHAEL P. MCMAHON
VIRGINIA B. TOWNES
AKERMAN, SENTERFITT
P.O. Box 231
Orlando, FL 32802-0231
(407) 843-7860

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

JAMES A. MOODY
1101 30th Street, NW
Washington, D.C. 20007
(202) 298-4766

STEVEN B. GOLD
111 Ponce de Leon Avenue
Clewiston, FL 33440
(863) 902-2126

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COALITION OF COTTON APPAREL IMPORTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

CARTER G. PHILLIPS
ALAN CHARLES RAUL*
ERIC A. SHUMSKY
MICHAEL C. SOULES
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

October 15, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the Beef Promotion and Research Act, 7 U.S.C. 2901 *et seq.*, and the Beef Promotion and Research Order, 7 C.F.R. pt. 1260, violate the First Amendment insofar as they require cattle producers and importers to fund generic advertising promoting the desirability of eating beef.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Coalition of Cotton Apparel Importers ("Coalition") is an unincorporated association of apparel retailers and importers. Its members are compelled—under the auspices of the Cotton Research and Promotion Act of 1966, 7 U.S.C. §§ 2101 *et seq.*, and implementing regulations, 7 C.F.R. pt. 1205 (Order) (collectively, the "Cotton Program")—to pay assessments that fund a program of cotton advertising to which the Coalition's members object.

This case is of substantial concern to the Coalition's members, because their First Amendment rights are trammeled by the Cotton Program in the same way that respondents' rights are affected by the Beef Research and Promotion Act and its implementing regulations (the "Beef Program"), 7 U.S.C. §§ 2901 *et seq.*; 7 C.F.R. pt. 1260. The Cotton Program, like the Beef Program, compels commodity producers and importers to fund speech with which they disagree—namely, advertising of the generic product. And, pursuant to that regime of compelled speech, each of the Coalition's members pays hundreds of thousands of dollars—or more—in annual assessments.

The Coalition has a strong interest in this case because of the particularly offensive nature of the Cotton Program. The Cotton Program commands assessments not only from producers and importers of cotton itself, but also from the commodity's downstream users—retailers that import cotton clothing (among their other products). Importers of cotton products have accounted for one third of the $60 million in annual fees paid into the Cotton Program. See USDA Re-

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

search & Promotion Task Force, *Report to the Secretary of Agriculture* 7 (1999). Yet the members of the Coalition have no particular interest in the Program's promotion of cotton per se; it is only one of the many products that they sell. And, they certainly have no interest in the advertisements crafted by the Cotton Board that promote products that compete with products imported and sold by the Coalition's members. As a result, contrary to petitioners' reasoning, it cannot be assumed that the Coalition or respondents benefit from—and certainly they do not agree with—the speech they are compelled to finance. Accordingly, the First Amendment harms that they suffer cannot be justified as "government speech."

SUMMARY OF ARGUMENT

The leading edge of petitioners' argument is the claim that the speech being challenged here is "government speech," and is therefore immune from First Amendment scrutiny. *E.g.*, U.S. Br. 11, 15; Neb. Cattlemen Br. 3. Likewise, they treat this as a case about nothing more than sensible regulation and administrative law. *E.g.*, U.S. Br. 10-11, 17. For these reasons, petitioners treat this Court's First Amendment precedents concerning compelled speech cases as largely irrelevant. That argument, however, has it backwards. To be sure, certain types of government speech (those that involve no compulsion) are immune from First Amendment attack—as, for instance, when a government official speaks in his or her official role. But this Court has never held that a program like the one in this case—in which a targeted group of private entities is compelled to pay for speech with which they disagree, and which is spoken in their name—is government speech. And more fundamentally, never has this Court found speech to be unassailable government speech when the rights and values underlying this Court's "compelled speech" precedents are so clearly infringed. The simple reality here is that respondents are private entities that are coerced to subsidize speech with which they disagree.

As an initial matter, the Secretary's decision to require respondents to fund speech with which they unquestionably disagree places this case squarely within this Court's precedents concerning compelled speech. This Court repeatedly has recognized that the First Amendment is violated when the government compels speech. This same principle applies not only to compulsion to *speak words* that an individual wishes not to speak, but also to coercion to *subsidize speech* that one does not wish to fund. And, the findings below make plain that respondents here, like the numerous other challengers to agricultural checkoff programs, object to the speech that they are compelled to fund. The checkoff programs require entities to subsidize speech that assists their competitors, both directly and indirectly, notwithstanding strategic, economic and, in some cases, ethical objections. Simply put, the challengers to these programs are not "free riders"—they are dissenters.

It is no answer to claim that these First Amendment problems are obviated by labeling the speech as "government speech." "Compelled speech" and "government speech" are not two mutually exclusive categories, the latter of which trumps the former. On the contrary, the inquiry whether a particular speech program is properly characterized as constitutionally immune "government speech" depends on whether the program compels private entities to speak in a manner to which they object. When the government "controls" speech by compelling it, U.S. Br. 20, the speech is not immunized—it is unconstitutional. Accordingly, the government speech doctrine has *never* been used to insulate a program of compelled speech from First Amendment challenge. The doctrine is a shield used by the government to parry the objections of unwilling listeners; it is not, as petitioners would use it here, a sword to prod unwilling speakers.

Here, the federal government's programs pose special risks to First Amendment values. They are structured in a manner that serves narrow, private interests and interferes with

meaningful, democratic accountability. They were structured in this way precisely to remove them from the normal democratic process. And they compel speech from private entities in a manner that this Court has often recognized violates the First Amendment. Accordingly, this Court should finally declare that, with the narrow exception of checkoff programs that meet the unusual, comprehensive regulatory circumstances of *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), these programs represent an unconstitutional incursion on the free speech rights of the coerced participants.

ARGUMENT

I. REQUIRING RESPONDENTS TO PAY FOR AGRICULTURAL ADVERTISING WITH WHICH THEY DISAGREE CONSTITUTES COMPELLED SPEECH THAT VIOLATES THE FIRST AMENDMENT.

A. Compelled Speech Is Forbidden By The First Amendment.

1. It is axiomatic that the First Amendment is violated when the government compels speech, just as when it suppresses speech: "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977); *id.* at 234 ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633-34 (1943).

To understand this principle fully, the analysis properly begins with the compelled speech doctrine's two canonical cases: *Barnette* and *Wooley*. In *Barnette*, the Court struck down a West Virginia statute that required all students to sa-

lute the American flag and recite the Pledge of Allegiance. *Id.* at 625-29. Although the West Virginia legislature instituted this requirement for worthy reasons—"'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of government," *id.* at 625—the Court gave no deference to the legislature's choice, *id.* at 638; instead, the Court struck down the compelled speech with a ringing denunciation: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein," *id.* at 642. Pertinent here, the principle of *Barnette* is not limited to professions of ideology. On the contrary, *Barnette* (and cases like it) were the "beginning point for ... analysis" in *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410 (2001).[2]

Barnette demonstrates the fallacy of the government's assertion that "[a] program involves government speech when the government controls the content of the speech that is disseminated under it." U.S. Br. 20. The government "control[led]" the speech at issue in *Barnette*, but the fact that the government coerced the speech hardly immunized it; on the contrary, it was precisely the fact of government control that rendered the speech unconstitutional.

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[2] Petitioners are therefore mistaken to argue that "*B[a]rnette* and *Wooley* are ... 'clearly inapplicable' to a program such as that established by the Beef Act," U.S. Br. 27-28. This argument depends entirely upon the government's characterization of *Wileman Brothers*, 521 U.S. at 470. But *United Foods* was decided after *Wileman Brothers*, and *United Foods* plainly holds that this Court's compelled speech jurisprudence is not just relevant, but is indeed the "beginning point for ... analysis." 533 U.S. at 410. To the extent *Wileman Brothers* disapproved reliance on the compelled speech cases, that reasoning is therefore necessarily limited to peculiar statutory schemes like the one at issue in that case, which involved "a more comprehensive program restricting marketing autonomy." *Id.* at 411.

The Court in *Wooley* again addressed the constitutional harms that arise when the state coerces speech. At issue were provisions of New Hampshire state law that required license plates to bear the state motto ("Live Free or Die") and made it a misdemeanor to cover "'the figures or letters'" on a license plate. 430 U.S. at 707-08. When the Maynards were prosecuted for covering the motto on their license plates, they challenged the state's action on First Amendment grounds, and this Court sustained that challenge. Recognizing that "the right to refrain from speaking at all" is a critical component of the First Amendment, *id.* at 714, the Court held that it is was unconstitutional to require the Maynards to "use their private property as a 'mobile billboard' for the State's ideological message," *id.* at 715.

Barnette and *Wooley* demonstrate the two important ways in which individual rights are affected when the government compels speech. These closely related infringements may be termed "coercive" or "first-person" harm; and "attributive" or "third-person" harm. First, compelled speech is tyrannical because, quite apart from an individual's interaction with the outside world, when the government coerces speech, such coercion interferes with personal liberty to craft beliefs and speak them freely; it is, therefore a first-person harm. See, *e.g.*, *id.* at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"); *Barnette*, 319 U.S. at 633-34 ("[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.... To sustain the ... salute we [would be] required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").[3]

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[3] *See also, e.g.*, 319 U.S. at 645 (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to

Compelled speech likewise impairs third-party relationships, because it creates the likelihood that thoughts and beliefs the speaker does not possess will be misattributed to him or her. It was for this reason that in *Wooley*, the Court recognized that forcing the Maynards to display the state motto against their will, "in effect requires that appellees use their private property as a 'mobile billboard'" that is "display[ed] ... to hundreds of people each day." 430 U.S. at 715. In *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, the Court likewise held that requiring parade organizers to include a group in the parade against their will would violate the First Amendment, in part because such forced association would risk "misattribution" of the group's message to the parade's organizers. 515 U.S. 557, 576-77 (1995); *accord Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 655 (1994) (in challenge to cable must-carry provisions, noting significance of the fact that there is "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator"); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (no First Amendment violation in part because the views of pamphleteers in a shopping center "will not likely be identified with those of the owner"); see also *Abood*, 431 U.S. at 258 (Powell, J., concurring in the judgment) ("Disassociation ... lie[s] at 'the core of those activities protected by the First Amendment.'").

Both of these forms of harm, as detailed below, see *infra* at 10-15, are present in the checkoff cases.

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refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society ....").

For this reason, it is beside the point that "Congress has not restrained anyone from engaging in commercial speech." U.S. Br. 39. As this Court long has recognized, "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Abood*, 431 U.S. at 234.

2. These same foundational constitutional concerns apply when the government requires people to "subsidize speech with which they disagree." *United Foods*, 533 U.S. at 411; *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 231 (2000) ("It infringes on the speech and beliefs of the individual to be required ... to pay subsidies for the objectionable speech of others ...."). Forced subsidization of speech, no less than the forms of compulsion that were at issue in *Barnette* and *Wooley*, constitutes compelled speech. The seminal case in this regard is *Abood*, which concerned compulsory union dues paid by government employees that were used, in part, "to contribute to political candidates and to express political views unrelated to [the union's] duties as exclusive bargaining representative." 431 U.S. at 234. The Court held that the compulsory dues were unconstitutional to the extent they required objecting union members to fund such speech, for precisely the same reasons that the speech in *Barnette* and *Wooley* was unconstitutional:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Id. at 234-35 (footnote omitted); *accord id.* at 222 ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."). Accordingly, the Court concluded that payments could be compelled to fund only speech that is "germane to [the union's] duties as collective-bargaining representative." *Id.* at 235.[4]

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[4] To be sure, the fact that speech has been compelled—as it was in *Abood*, and as it has been here—is not the end of the constitutional in-

The Court reached precisely the same conclusion in *Keller* v. *State Bar*, 496 U.S. 1 (1990), which concerned compulsory payments to a state bar association. Applying *Abood*, the Court struck down the dues requirement insofar as the dues were used to fund activities that were not germane to "the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. Again, the Court recognized the fundamental values that are at stake when the government compels speech, whether such coercion takes the form of speech itself or compulsory subsidization of speech. Quoting Thomas Jefferson, it reaffirmed that """to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."" *Id.* at 10.

This same principle was given force in *United Foods*, in which the Court struck down the Mushroom Promotion, Research, and Consumer Information Act, an agricultural checkoff program that is closely analogous to the Beef Program at issue here. The Court looked to *Wooley*, *Barnette*, *Abood* and *Keller*, and recognized that these "precedents concerning compelled contributions to speech provide the beginning point for ... analysis." 533 U.S. at 410. Importantly, the Court dismissed as a threshold matter the government's suggestion that the First Amendment was not implicated because commercial speech was at issue:

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quiry. Rather, once it has been determined that speech was compelled, a court still must consider whether this use of the government's coercive power is sufficiently justified. The germaneness inquiry is one method for testing this question, as are the competing *Central Hudson* and strict scrutiny tests. Those questions are addressed elsewhere. *See generally* Respondents' Br.; FLAG Br.; WLF Br. The purpose of discussing the compelled speech doctrine here is instead to demonstrate that the values of the compelled speech cases are implicated in this case, and that when such values are at issue, this Court has been unwilling to bless the compelled speech as "government speech."

> The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited.... First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.

Id. at 410-11.

The Court then went on to reject the argument—advanced again by petitioners here in slightly less explicit form—that the mushroom growers' constitutional concerns were less significant because their objection to the message—that "mushrooms are worth consuming whether or not they are branded"—"could be seen as minor." *Id.* at 411.[5] On the contrary, the Court recognized that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom." *Id.*

B. The Speech Promulgated By Agricultural Checkoff Programs Is Compelled Speech.

1. The Secretary's requirement that cattle producers fund speech with which they disagree violates the First Amendment, in precisely the ways that the compelled speech cases

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[5] It is quite plain from petitioners' briefs that they view respondents' challenges to the Beef Program as trivial. They assert that "all beef producers benefit from generic advertising promoting beef," U.S. Br. 17—which respondents surely dispute—and speak dismissively of the financial burdens placed on respondents, *id.* at 41 (the Program "requires *only* that cattle producers contribute financially" (emphasis added)), and of their right to dissent, *id.* at 18 ("disagreement provides no basis under the First Amendment ... to excuse those who object from having to share the costs of the program"). The same claim was made in *United Foods*, and could have been made in *Abood* and *Keller*.

forbid. It is undisputed that respondents have a variety of serious and principled objections to the speech that they are forced to fund. Respondents raise domestic, grain-fed beef, which they believe to be superior to imported, grass-fed beef. JA 25, at ¶¶ 41-42. They object to the generic advertising of beef, because it sends the message that all beef is the same, and thereby conflicts with their belief that domestic grain-fed beef is superior. *Id.* at 34-36, at ¶¶ 96-98, 100-101; see also, *e.g.*, *id.* at 59, 62, 65, 68, 71, 74-75, 78-79. Furthermore, certain respondents produce particular brands or breeds of beef that they believe to be qualitatively superior to other beef—including, for instance, certified Angus or Hereford. *Id.* at 36, at ¶ 103.

Forcing respondents to pay money for speech with which they disagree constitutes both coercive and attributive harm under the First Amendment. As with any compelled speech, there can be no doubt about the coercive effect. Respondents are forced to support the message that all beef is good, when that simply is not what they believe. Furthermore, there is attributive harm. The advertisements are attributed, quite broadly, to "America's Beef Producers." *E.g.*, JA 50, 51. Respondents are among "America's Beef Producers"—and the message is therefore directly attributed to them—even though it is undisputed that they do not believe it. These advertisements are nothing more than the "'mobile billboard'" that the Court disapproved in *Wooley*. 430 U.S. at 715.

That respondents have very real objections to the speech they are forced to subsidize is a complete answer to petitioners' effort to frame this as a case with barely any First Amendment implications. Time and again, petitioners suggest that this case concerns nothing more than "collective action," "free riders," and the Secretary's claimed interest in promoting beef consumption. *E.g.*, U.S. Br. 10-11, 17. These assertions simply beg the question, for they presuppose that

such interests trump the First Amendment.[6] To be sure, the government sometimes has an interest in solving collective action problems. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (plurality). But whether there is a collective action problem to be solved says nothing about whether the means of solving that problem are constitutional; Mancur Olson may have had much to say about free riders, U.S. Br. 17 (citing Mancur Olson, *The Logic of Collective Action* (1971)); Cal. Agric. Issues Forum Br. 19 (same), but he had little to say about the First Amendment. The fact that Congress perceived there to be a problem, U.S. Br. 11, is hardly relevant to whether the solution it devised was a constitutional one. *Wileman Bros.*, 521 U.S. at 477 (Souter, J., dissenting) ("the legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation"). If the Secretary of Agriculture wished to use her budget to promote beef consumption, no one would blink an eye. But the government has decided to use means that implicate core First Amendment values, and petitioners cannot simply wish away those constitutional concerns.

Rather, as this Court's compelled speech precedents demonstrate, the proper threshold inquiry is whether respondents disagree with the speech they are compelled to support. *United Foods*, 533 U.S. at 411. In that regard, this case is not about collective action problems and free riders. A free rider is, as one of petitioners' *amici* recognizes, one "'who shares in the benefits.'" Cal. Agric. Issues Forum Br. 19. The very point of this challenge is that respondents, and other challeng-

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[6] One *amicus*, in fact, makes this argument explicitly, claiming that "[t]he fact that the *means* to Congress's end involves a speech component" is irrelevant to the First Amendment analysis. Br. of *Amicus* Cotton Shippers Ass'n 11. The notion that speech may be compelled so long as Congress has some non-speech purpose in mind is a radical view of the First Amendment, and one that is quite foreclosed by this Court's precedents, from *Barnette* forward.

ers like them, disagree with the speech. They do not believe that they benefit from it, and their intent is not to "free ride" on it; they wish to dissent from it, and at a minimum do not want to subsidize it. And their perspective in this regard is the relevant one. *United Foods*, 533 U.S. at 411 ("'[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented'").

For just this reason, it is important to understand the numerous ways in which the compelled subsidy of agricultural checkoff programs infringes upon First Amendment rights, and the various reasons that challenges to them have been brought. In some cases, like this one and *United Foods*, the objection is that generic advertising undercuts the seller's own, better product (whether domestic beef or a particular brand of mushrooms). This Court in *United Foods* recognized that this is a valid First Amendment objection. *Id.* And this objection demonstrates the fallacy of the Secretary's claim that advertising under checkoff programs "involves the promotion *of the very product* that the persons assessed have chosen to produce." U.S. Br. 38. A related objection is that generic advertising undercuts efforts to promote a premium product—as with the Angus and Hereford beef at issue here. JA 36; see also, *e.g.*, *Delano Farms Co.* v. *Cal. Table Grape Comm'n*, 318 F.3d 895, 897 (9th Cir. 2003) (challenge by sellers of "high end" grapes sold "to 'stores that will pay more money for higher quality product, as opposed to large grocery chain stores'").

Other programs impose fees to support advertising that is not merely inconsistent with, but in fact directly contrary to, the interests of the taxed party. The Cotton Program, for instance, does so in at least three separate ways. First, cotton apparel importers are charged fees on cotton apparel *imports* to support a program whose stated goal is "to maintain and expand domestic and foreign markets and uses *for United States cotton*." 7 U.S.C. § 2101 (emphasis added). Thus, al-

though *amicus*' members deal in imported cotton apparel, they still are forced to fund advertising for domestic cotton.

Second, many of these same importers do not deal exclusively in cotton; they import non-cotton goods as well. See Emergency Pet'n to Correct Constitutional Violation at 8, 9, *In re Citetec*, No. CRPA 04-00001 (U.S.D.A. 2004). Accordingly, they have no interest in subsidizing speech to further the message that "[c]otton is the basic natural fiber of the Nation." 7 U.S.C. § 2101. Yet they are forced to do so. Third, the speech funded by the Cotton Program includes advertising that features clothing by particular designers.[7] But many of the entities that are forced to contribute to this advertising are retailers that sell competing products. In no way is this speech on which they "free ride." It is speech that harms their interests; with which they disagree; and that they do not wish to subsidize.

Additional problems are well illustrated by the brief submitted by *amicus* Rose Acre Farms, which produces eggs. It objects to the egg program and the advertising it must subsidize, because it disapproves of the business practices of other egg producers and does not wish to finance speech that supports those practices. Whereas Rose Acre Farms ensures that its "chickens producing eggs are treated in a humane man-

[7] An example of such an advertisement—which features a "[s]tructured suit by Peter Som"—is reproduced at http://www.cottoninc.com/postCards2002/images/brilliant.jpg; *see also* http://www.cottoninc.com/postCards2002/images/elegant.jpg ("Corduroy evening gown by Kenth Andersson"); http://www.cottoninc.com/postCards2002/images/executive.jpg ("Tailored suit by Donna Degnan."). These advertisements regularly appear in print. *See, e.g.*, Women's Wear Daily, May 27, 2004, at 16 (promoting clothing by Lily Pulitzer).

These advertisements—like the advertisements at issue in the Beef Program—cause serious attributive harm. Just as the beef ads are attributed to "America's Beef Producers," the cotton ads—designed to promote United States cotton—are laid at the feet of "America's Cotton Producers and Importers," *id.*, not the U.S. government or the Secretary of Agriculture.

ner," "[t]he generic advertising engaged in by the American Egg Board promotes the consumption of eggs which do not meet these high quality standards." Rose Acre Farms Br., Mot. for Leave to File Brief *Amicus Curiae* and Statement of Interest, at 1-2. Thus, it simply is not the case that Rose Acre Farms generically supports the production of eggs, as petitioners assume that it must; rather, it supports such production only under narrow conditions that most producers do not satisfy, but which are ignored by the Egg Board's promotions.[8]

2. These multiple objections to checkoff programs demonstrate the impracticality of petitioners' suggestion that this Court draw a distinction between "ideological" and other forms of objections. *E.g.*, U.S. Br. 41 (arguing that the Beef Program "does not compel any producer to endorse or to finance any political or ideological point of view"); *id.* at 27, 38 (focusing on this same purported distinction); Neb. Cattlemen Br. 37. As a threshold matter, the Court rejected this very argument in *United Foods*:

> The Government claims that, despite the lack of cooperative marketing, the *Abood* rule protecting against compelled assessments for some speech is inapplicable [because there is no violation of] "'freedom of belief.'" We take further instruction, however, from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection.

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[8] Another serious and striking objection to checkoff-sponsored advertising arose in a case concerning the Florida Citrus program. There, a producer of grapefruits objected to the fact that

> the Department of Citrus has created and promoted recipes for alcoholic drinks containing grapefruit juice and has promoted the television program 'Sex and The City' in relation to consumption of alcoholic grapefruit juice drinks. The lifestyles, conduct and morality thereby promoted are not consistent with our views, and we object to being forced to subsidize it.

Br. of Appellees at 16, *State of Fla., Dep't of Citrus* v. *Graves Bros. Co.*, No. 2D03-2276 (Fla. Dist. Ct. App. 2003).

533 U.S. at 413 (citation omitted); *accord Abood*, 431 U.S. at 231 (rejecting the notion that "political" speech should be advantaged over "expression about philosophical, social, artistic, economic, literary, or ethical matters"); *Keller*, 496 U.S. at 13 ("[w]e are not possessed of any scales which would enable us to determine" whether labor unions or the California State Bar "serves more substantial public interests").

The line the government embraces is surely untenable. There is no principled way to distinguish between "ideological" or "political" objections, on the one hand, and other assertedly lesser forms of dissent ("economic" claims, presumably, on petitioners' view), on the other. Although the government repeatedly hints at such a distinction, it makes no affirmative case about how to draw it. It is unclear how the desire not to support one's competitors is "mere" economic objection, or why being compelled to do so is less significant under the First Amendment. Indeed, the Court in *Abood* explicitly equated an "object[ion] to [a] union's wage policy" with "ideological objections." 431 U.S. at 222. The appropriate rule is a simple one—when a program taxes a narrow group[9] for the purpose of funding speech attributable to that group (and assuming, of course, that the speech is not otherwise justifiable, see *supra* note 4), there must be some means by which dissenters can be relieved of their burdens under the program. *Abood*, 431 U.S. at 237-41.

II. THE FIRST AMENDMENT INJURY IN THIS CASE IS NOT OBVIATED BY LABELING THE PROGRAM "GOVERNMENT SPEECH."

In light of the serious First Amendment harms implicated by the program of compelled speech here, the "government speech" doctrine cannot inoculate the Beef Program from First Amendment challenge. This Court has repeatedly de-

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[9] When general tax revenues are at issue, the rule is of course different. *See infra* at 22-24.

clined to permit the government speech doctrine to shield programs that cause the types of harms set forth above. And never has the government speech doctrine been applied to fees exacted from narrowly defined groups to support speech purportedly issued on behalf of those groups.

A. The Government Speech Doctrine Is Informed By The Same First Amendment Values That Underlie The Compelled Speech Cases.

1. It is commonplace that "the government ... is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see also *Southworth*, 529 U.S. at 229 (recognizing the significance of whether "the government itself is the speaker"). Thus, when the government speaks, it may act in ways that would otherwise be forbidden—it may, for instance, engage in viewpoint- or content-based discrimination. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 544 (2001); *Rosenberger*, 515 U.S. at 833.

In certain circumstances, it is easy to identify government speech. There can be no doubt that government speech is at issue when a government official states the policy of the government—when the Secretary of Agriculture, for instance, announces that the government supports the use of new technologies in farming. See Ann M. Veneman, Sec'y of Agric., Address at the Farm Science Review (Sept. 21, 2004), *available at* http://www.usda.gov/documents/NewsReleases/2004/09/0412.doc. It is likewise government speech when the government, through general revenues, funds speech, *Regan* v. *Taxation with Representation*, 461 U.S. 540, 548 (1983), or refuses to do so, *Rust* v. *Sullivan*, 500 U.S. 173, 194-95 (1991). But beyond these two categories (and even sometimes within the latter one, see *Velazquez*, 531 U.S. at 543 (striking down funding restrictions that "regulat[e] private expression"), the analysis is significantly more complicated. It is not enough to assert that speech is "government speech," and thus that the First Amendment can be dispensed with. Rather, the determination whether speech should be attributed

to the government has always depended upon the same First Amendment concerns that underlie the compelled speech cases—coercive and attributive harm. No case holds that the government can compel unwilling speakers to speak merely by labeling the speech "government speech"; rather, the determination whether speech is the government's must be informed by the compelled speech cases.

This is clear from *Rust* (which, although it did not explicitly treat the issue as government speech, it has been interpreted as such, see *Velazquez*, 531 U.S. at 543-44). *Rust* concerned government funding of a program intended to put forward the government's message. In particular, it presented a First Amendment challenge to a statute and implementing regulations that "provided federal funding for family-planning services," but restricted the use of such funds "'in programs where abortion is a method of family planning.'" 500 U.S. at 178. The Court upheld the restrictions, concluding that the government may engage in "selective[] fund[ing]" without violating the First Amendment. *Id.* at 193.

In so doing, the Court noted that the program limited the speech activity of health care providers only when they were acting within the scope of the government program—i.e., when they were acting as agents of the government. *Id.* at 196 ("The ... regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."); *id.* at 199 ("The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project ...."). And of critical importance here, the Court took care to note that the program in no way compelled any speech: "Nothing in [the program] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200; see also *id.* ("The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program."). In short, the

Court's determination that the speech could be categorized as government speech was informed, as it should be in this case, by the Court's conclusion that the program neither prohibited nor compelled private speech.

It is for these same reasons that *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), offers petitioners no support, and instead illustrates why respondents must prevail. *Santa Fe* addressed whether certain "invocations" before high school football games violated the Establishment Clause. In considering whether the state had endorsed religion, the Court noted that the challenged speech was "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" and, moreover, was limited by "particular [government] regulations." *Id.* at 302-03. Petitioners and their *amici* argue that similar facts are present here, and that the Beef Program is therefore constitutional. *E.g.*, U.S. Br. 20-21, 32; Neb. Cattlemen Br. 28.

To be sure, the types of facts identified in *Santa Fe* are generally relevant in determining whether it is the government that has acted. But the conclusion that these factors were enough to establish state action under the Establishment Clause in *Santa Fe* assuredly does *not* mean that there is government speech here under the Speech Clause. As the Court itself recognized in *Santa Fe*, "not every message delivered under [the above-listed] circumstances is the government's." 530 U.S. at 302. More fundamentally, the government role that was necessary to find a First Amendment violation in *Santa Fe* is not sufficient to establish government speech here—quite simply, the substantive standard for identifying government action that is subject to the Establishment Clause is fundamentally different than the test for designating government speech that is exempt from the Speech Clause.

Both the Establishment Clause and the Speech Clause limit the coercive power of the government. In the Establishment Clause context, the relevant inquiry is whether the state has

forced religion upon the citizenry by "endors[ing]" it. *E.g.*, *id.* at 302-05. When the state engages in endorsement—when it "sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community'"—the speech "is not properly characterized as 'private' speech." *Id.* at 309. But the inquiry under the Speech Clause is vastly different. Whereas a relatively low bar to finding government speech in the Establishment context protects the rights of minorities against the coercive power of the state, a correspondingly low bar in the Speech context would permit easy invocation of the "government speech" doctrine, inoculate the government against First Amendment challenge, and make it easier to infringe the speech rights of the minority. Simply put, if it were government speech every time the government "endorsed" a message, the free speech protections of the First Amendment would mean precious little. Indeed, if that were the test, *Barnette* would have been decided differently, for West Virginia certainly endorsed the message that it compelled schoolchildren to recite.

Petitioners' proposed tests for identifying government speech, derived from *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), are woefully inapt because they provide wholly insufficient protection for the values that the Speech Clause is meant to serve. U.S. Br. 20-24; Neb. Cattlemen Br. 24-26.[10] That Congress has specified the message

[10] *Lebron* is in any event inapposite, for reasons similar to those that distinguish *Santa Fe*. *Lebron* explicitly recognized that even when an entity is "an agency of the Government[] for purposes of the constitutional *obligations* of Government," it need not be treated as such with regard to "the '*privileges* of the government.'" 513 U.S. at 399 (emphasis added); *see also id.* at 394 (recognizing that an entity may be an "agency or instrumentality of the United States" only for certain "purpose[s]"). That distinction governs here. In *Lebron*, the government's "obligations" under the First Amendment were at issue—how the First Amendment burdened the ability of a governmental corporation to engage in viewpoint discrimination. But here, a "privilege" is at issue—whether a private entity (the

does not solve this problem—it simply highlights that the government has compelled private citizens to speak its message. (And in none of the cases cited by petitioners did Congress specify the message and then fund it through narrow taxes on discrete groups.) The fact that Congress created entities to administer the speech simply means that the government has outsourced the implementation of its coercion. And the fact that the Secretary of Agriculture purports to oversee the agricultural checkoff programs only confirms that, at the end of the day, it is the coercive power of the state that is at work. Speech cannot be insulated from challenge as "government speech" when unwilling participants are compelled to speak. The simple reality in this case is that private entities are indeed coerced to subsidize speech with which they disagree.

2. The need to guard against coercive and attributive harm likewise demonstrates why, as the Court recognized in *Keller*, there is a critical distinction between programs funded by general revenues and those funded by narrow taxes levied on unwilling participants in a mandatory program. 496 U.S. at 10-11. In *Keller*, the Court considered whether the State Bar of California engaged in "government speech" for purposes of the First Amendment. The California Supreme Court had concluded that the Bar was a government agency for purposes of the government speech doctrine. 496 U.S. at 11. Indeed, the Bar was established by state law, *Keller* v. *State Bar*, 767 P.2d 1020, 1023 (Cal. 1989); had statutorily delineated functions, *id.* at 1024; was governed by a board appointed in part by the governor, *id.*; and was a public corporation, *id.* at 1025. Nonetheless, this Court rejected the California Supreme Court's determination that the Bar was a government agency. Concluding that the "'government speech' doctrine" did not

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Beef Council) and a quasi-public entity (the Beef Board) may avail themselves of the "government speech" defense. For all of the reasons set forth above, it may not.

apply, 496 U.S. at 10, the Court focused on facts that are equally germane in this case: the organization's membership was limited to a particular profession, and "[i]ts principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members," *id.* at 11.

Keller is significant here in several important respects. It vividly illustrates that claims of government speech require careful scrutiny, not reliance on label-making. And it shows that the inquiry into government speech is all the more significant when narrowly targeted taxes are at issue. The Third Circuit properly recognized this point in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), another case involving a challenge to the Beef Program. That court rejected the same argument presented here, U.S. Br. 28-30; Neb. Cattlemen Br. 33-38—that challenges to compelled taxes on a narrow group are no different than challenges to general taxes:

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

885 F.2d at 1132 (citation omitted). It is precisely because contributors to checkoff programs belong to narrowly defined and "publicly identified" groups, and are required in that capacity to fund a program that purports to speak on their behalf, that the First Amendment is violated. They are coerced to subsidize speech, by means of funds that are directly at-

tributable to them, and the speech issued on their behalf is a message with which they disagree.[11]

This is why checkoff programs, and the objections to them, are easily distinguished from protests against speech funded by general tax revenues. Where general revenues are involved, it is well established that no First Amendment challenge is available. *Keller*, 496 U.S. at 12-13; *United States* v. *Lee*, 455 U.S. 252, 260 (1982). This is sensible as a practical matter, for to permit such lawsuits would ensure governmental paralysis. 455 U.S. at 260. Furthermore, there is little harm caused by such speech, as the coercive effect is de minimis, and there is little risk that the speech will be (mis)attributed to the unwilling taxpayer. In the terms used by *Frame*, the "nexus" is "attenuated" to the point of being nonexistent. 885 F.2d at 1132. No one assumes that the United States speaks for all of its citizens, but most people do probably believe that "America's Beef Producers" speak for all producers of beef. As a matter of democratic theory, too, to permit such challenges would make little sense; "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, account-

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[11] The argument that such concerns arise only when "*private* speech," but not "*government* speech" is at issue, Neb. Cattlemen Br. 34-35, simply begs the question. Whether speech can reasonably be categorized as "government speech" depends upon whether private entities are being forced to speak.

It is therefore of no significance here that it may sometimes be government speech "when the government 'disburses public funds to private entities to convey a governmental message,'" U.S. Br. 15 (quoting *Rosenberger*, 515 U.S. at 833), or when the government "enlist[s] private actors in disseminating the government's message," *id.* at 24. It is not *necessarily* government speech under those circumstances, *Velazquez*, 531 U.S. at 542 ("Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however."), and it should not be treated as such when coercion is present, which is precisely the point *Rust* took pains to emphasize. *See supra* at 19.

able to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235; see *infra* Section II.B.

But the reasons why challenges to speech funded by general tax revenues are unavailing, dissipate when challenges to speech derived from narrowly targeted taxes are at issue. The practical concern evaporates, because the universe of such suits is limited, by definition, to challenges based upon targeted taxes. There is greater First Amendment harm where such taxes are concerned, precisely because the compelled contribution "to a fund earmarked for the dissemination of a particular message associated with that group" necessarily means that "the government has directly focused its coercive power for expressive purposes." 885 F.2d at 1132.

Southworth is not to the contrary. Petitioners place heavy reliance on that case's statement that "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." 529 U.S. at 229; *see* U.S. Br. 18, 25, 28; Neb. Cattlemen Br. 19, 38. That statement does not control here. First, it was self-avowed dictum, *see* 529 U.S. at 229 (noting that the case "does not raise [this] issue"), and therefore is not controlling, *see In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases"); *Alden* v. *Maine*, 527 U.S. 706, 735-36 (1999). Second, the Court recognized that this principle holds true only "as a general rule." *Southworth*, 529 U.S. at 229. Third, of particular relevance here, the Court noted that, even were it government speech, an inquiry would *still* be necessary to determine whether there existed sufficient "political controls" to overcome "First Amendment objections." *Id.* Fourth, and perhaps most important, that case arose in the unique context of a public university. *Id.* at 230-32. That compelled student fees may be used to fund speech does *not* "reflect[] the common-sense notion that the costs ... should be borne by those who benefit from them." U.S. Br. 29. Rather, it reflects the common-

sense notion that public universities could not function if every student were permitted to withhold the portion of his tuition that funds classes, speakers or activities with which he disagrees. The message that "beef is good," funded by a tax on beef producers, hardly presents similar concerns.[12]

At the end of the day, it is utter hyperbole to claim that this case could "eviscerate the government speech doctrine," U.S. Br. 25, or that the challengers to agricultural checkoff programs seek "to silence the government," *id.* at 18; *accord* Mich. Pork Producers Br. 2 ("This case is about ... a claimed right to prevent the federal government from telling the public about the merits of eating beef."). The government remains free, regardless of the outcome of this case, to engage in such speech by funding it by means of general revenues or through a voluntary program. What it cannot do is define a class of people, levy taxes on that narrowly drawn class, and then issue speech on behalf of that class with which members of that class fundamentally disagree.

B. Claims Of Government Speech Deserve Particular Scrutiny When Quasi-Government Entities Are At Issue.

Keller further teaches that the need to examine claims of government speech is heightened when the program incorporates private or quasi-private entities, as is the case here (and in most other checkoff programs), for reasons that relate to the functioning of the democratic process. *Keller* recognized, on the one hand, that "the typical government official or

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[12] This case does not call into question user fees, which are obviously distinguishable. As the Secretary admits, the purpose of user fees is "to offset administrative and law enforcement expenses." U.S. Br. 30; they are merely "[a] charge ... for the use of a particular item or facility." *Black's Law Dictionary* 1579 (8th ed. 2004). User fees do not fund speech, and the Secretary in fact concedes that the user-fee cases upon which it relies "do not involve assessments to support government speech programs." U.S. Br. 31.

agency" represents the broader democratic polity, and must be free to speak in that representative role. 496 U.S. at 12-13. And if the polity disagrees with this message, it can react through political channels. *Southworth*, 529 U.S. at 235.

But when a "specialized" program has been created, with a membership defined by its profession and forced to participate, there is no such democratic accountability. *Id.* As Justice Powell observed in *Abood*:

> [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

431 U.S. at 259 n.13 (Powell, J., concurring in the judgment); see also *Keller*, 496 U.S. at 12 (the "specialized characteristics of the State Bar of California ... served to distinguish it from the role of the typical government official or agency").

A specialized program is not accountable to the normal democratic process because it relies on targeted taxes that fall on a targeted group and therefore need not face the scrutiny of the polity as a whole. Here, in fact, the government admits that the cost of the Beef Program was levied on beef producers precisely because, by taxing that group "rather than the public at large, Congress avoided the risk of undermining the very support for the beef industry that it sought to engender from the public." U.S. Br. 41. The Cotton Board's web site likewise touts the fact that "NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED." Cotton Board, *Facts About Checkoffs*, *at* http://www.cottonboard.org/index.asp?Cat=2&sub=&cid=364 (last visited Oct. 13, 2004). In short, the very purpose of structuring these programs in this fashion is to remove them from the democratic process, on the theory that society as a whole would not be willing to pay for them.

Nor does the internal functioning of these programs provide a reliable route to democratic accountability. Rather than direct control by politically accountable officials, these programs are operated in the first, and perhaps only meaningful, instance by industry members. The statutes *require* that the operation of the program be contracted out to an entity comprised of industry members. 7 U.S.C. § 2904(6) (beef); *id.* § 2106(g) (cotton). And that private entity does not even report directly to a politically accountable official; it operates through yet another private entity—here, the Beef Board. *Id.* § 2904; 7 C.F.R. §§ 1260.141-.169; *accord* 7 U.S.C. § 2106 and 7 C.F.R. §§ 1205.322-.332 (Cotton Board). To the extent that there is any democratic control, it comes only as a final, remote layer of review, and even then, it has been found to be merely "ministerial." Pet. App. 55a. And any such control is compromised by the fact that in certain programs, the program officials are paid out of checkoff funds, 7 C.F.R. § 1205.334(b)(2), (d)—they are, in short, beholden to the program that they operate.

Significantly, the boards and councils that administer certain programs need not be—and in fact are sometimes *statutorily precluded* from being—representative of the entities upon which they levy taxes. In the Cotton Program, the speech-supportive taxes are levied upon both cotton producers and cotton importers. 7 U.S.C. § 2106(e)(1)(A), (C). But only producers—not importers—may be represented in Cotton Incorporated, the entity that operates the program. *Id.* § 2106(b). Importers have sought representation, but with no success.[13]

Given the nonrepresentative and unaccountable nature of these programs, it is no surprise that they pose a serious risk

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[13] It is perhaps this lack of representation that explains the unfair double taxation to which importers continue to be subjected. See U.S. GAO, GAO/RCED-96-49, *Agricultural Marketing—U.S. Cotton Market Before and After Import Assessments* 2, 9-10 (Jan. 1996).

that money will be used as a weapon against dissent. The district court in this case found, for instance, that the Board was using millions of dollars of checkoff funds in an effort to discourage a referendum that would end the Board or the Program. *Livestock Mktg. Ass'n* v. *USDA*, 132 F. Supp. 2d 817, 820-22, 825-26 (D.S.D. 2001) ("*LMA*"). Using the compelled checkoff contributions of producers who dislike the program, in order to campaign against the views of those same producers, is offensive. Furthermore, such programs have been plagued by waste and self-dealing, as Inspector General reports have chronicled.[14] More to the point, as noted above, *supra* at 13-14 & n.7, it is commonplace under the checkoff programs for "one entrepreneur [to be forced to] finance advertising for the benefit of his competitors." *United Foods*, 533 U.S. at 418 (Stevens, J., concurring). And it is indeed the case that "the generic advertising promotes some brands but not others." *Id.* at 428 (Breyer, J., dissenting).[15]

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[14] For instance, the Cotton Board and Cotton Inc. have been admonished for spending $360,000 on a Christmas party at the Metropolitan Museum of American Art in New York, which "was held to promote the stylishness of cotton." *See* USDA, Office of Inspector Gen., Audit Rep. No. 01099-2-At, *Agricultural Marketing Service, Cotton Research & Promotion Program, Cotton Board* 14-15 (May 1996). Audits further revealed that program funds were spent on "spouse meals, open bars, individual bar bills, and golf fees," *id.* at 14, and on a country club membership for the President of Cotton Inc., *id.* at 17.

[15] For precisely these reasons, it is no answer to argue that these programs' infringements on the speech rights of dissenters will be handled by the referendum process. U.S. Br. 32, 36, 42; Neb. Cattlemen Br. 4, 43, 44. As a factual matter, it is clear (for the reasons noted above) that the referendum process simply has not protected minorities. This result is not surprising—as this Court previously has recognized, referenda are not constitutionally sufficient to protect minority speech rights. *Santa Fe*, 530 U.S. at 304 (a "student election system .... implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced"; "this student election ... places the students who hold [minority] views at the mercy of the majority"); *Southworth*, 529 U.S. at 235. These problems are exacerbated by

* * * *

The Beef Program, like other agricultural checkoff programs, taxes unwilling participants to fund speech that is in no real sense the government's. Although the government outlines the basic message, the speech is voiced on behalf of the taxed, using the funds that they have been forced to contribute. Under these circumstances, the program cannot be justified as government speech. The speech is compelled, and as such is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

CARTER G. PHILLIPS
ALAN CHARLES RAUL*
ERIC A. SHUMSKY
MICHAEL C. SOULES
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

October 15, 2004

* Counsel of Record

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the Beef Board's misappropriation of checkoff funds to campaign against an adverse referendum. *LMA*, 132 F. Supp. 2d at 820-22, 825-26.

(21) (18)

Nos. 03-1164 & 03-1165

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In The Supreme Court of the United States

ANN M. VENEMAN,
SECRETARY OF AGRICULTURE, *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JOSEPH AND BRENDA COCHRAN AND THE INSTITUTE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM H. MELLOR
STEVEN M. SIMPSON
Counsel of Record
SCOTT G. BULLOCK
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF *AMICI CURIAE*[1]

Joseph and Brenda Cochran own a small, family-operated dairy farm in Tioga County, Pennsylvania. They are the respondents in *Veneman, et al. v. Cochran*, Case Nos. 04-166 and 04-0446, in which petitions for certiorari were filed on August 2, 2003 and September 30, 2004, respectively. Those cases involve constitutional challenges to the Dairy Promotion Act, which is very similar to the Beef Promotion and Research Act of 1985 (the "Beef Act") at issue in this case. The Dairy Promotion Act compels dairy producers like the Cochrans to pay assessments on the milk they sell to fund generic advertising programs similar to those funded by the Beef Act. The Cochrans are also subject to mandatory assessments under the Beef Act when they periodically sell cows or calves, whether or not the animals are used for their beef.

The Cochrans object to the advertising under the dairy and beef programs, and they object to being required to associate with the boards that operate these programs and with other farmers in order to promote a message with which they disagree. The Cochrans are traditional dairy farmers who practice less intensive farming methods than larger-scale commercial dairy farmers. The Cochrans attempt to balance the desire to produce a large volume of milk with a concern for the health of their cows, the longevity of their herd, and the impact of their farming on the environment. Thus the Cochrans allow their cows

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[1] The parties in the case have consented to the filing of this *amicus* brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

more time and room to graze and calve than many farmers, and they do not use bovine growth hormone. While their methods may produce less milk than more intensive farming methods, the Cochrans are able to keep their cows longer and have a lower culling rate than many other dairy farmers. The Cochrans believe that this is a worthwhile trade off because they believe their methods promote a better use of resources, protect the environment, and provide a healthier product.

The Cochrans do not believe that milk and beef are merely generic products that bear no distinction based on how and by whom they are produced. As traditional farmers, the Cochrans take pains to produce milk in a particular manner, and they object to being lumped together with all other dairy farmers and forced to promote the message that all milk is the same.

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty and restoring constitutional limits on the power of government. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves the government's ability to compel individuals and corporations to associate and to fund speech concerning their chosen businesses. As such, it implicates the Institutes' interest in the full protection of speech involving commercial pursuits, which includes both the right of Americans to speak and associate freely, as well as their corresponding right to remain silent and independent.

The Institute and the Cochrans file this brief in support of the Respondents to highlight the adverse impact of programs such as the Beef Program on the right of association and to emphasize that the advertisements sponsored by promotional acts such as the Beef Act often contain content with which many producers disagree.

STATEMENT OF THE CASE

Respondents are five cattle producers and two trade associations who have voluntarily joined forces to oppose an *involuntary* government-enforced program that compels them to associate with other beef producers and organizations to promote a message with which they disagree.

Under the Beef Promotion and Research Act of 1985 (the "Beef Act"), 7 U.S.C. § 2901 *et seq.*, all producers and importers of beef must pay $1 per head of cattle they sell (which is often referred to as the "beef checkoff") to finance a promotional program designed to "advance the image and desirability of beef and beef products." 7 U.S.C. § 2904(8); 7 C.F.R. § 1260.172. Producers must pay this assessment regardless of whether they agree with the advertising and promotional programs sponsored by the Beef Act, and whether or not the cattle subject to the assessments are ever used for their meat. The Cochrans, for instance, often sell cows subject to mandatory assessments under the Beef Act that are used for breeding or as dairy cows, rather than for their meat.

To administer the program, the Beef Act authorizes the creation of a Cattlemen's Beef Promotion and Research

Board (the "Beef Board"), which is composed of private beef producers and importers nominated by state beef-producer organizations and approved by the Secretary of Agriculture. 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141. The Beef Act also authorizes the creation of a Beef Promotion Operating Committee (the "Operating Committee"), which is responsible for developing specific promotional, advertising and research projects under the Act. 7 U.S.C. § 2904(4). The Operating Committee is composed of ten members of the Beef Board and ten "producers elected by a federation that includes as members the qualified State beef councils." *Id.* That federation is the Checkoff Division of the National Cattlemen's Beef Association ("NCBA"). The NCBA is a private trade association that works in close conjunction with the Beef Board in developing and implementing advertising and promotional programs under the Beef Act.[2]

In promotional literature, the Beef Board has described the beef program as an industry self-help program, created, financed, and operated by and for private beef producers. J.A. 81, 93, 102. The Board has described itself as "an independent organization of 111 'grassroots' volunteers"

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[2] The website of the NCBA, http://www.beef.org, prominently features a link from its homepage to a website sponsored by the Beef Board, http://www.beefitswhatsfordinner.com/. The websites appear for all intents and purposes to be one and the same. The Beef Board's website states that the "NCBA is a contractor of Checkoff dollars used for beef promotion and research efforts on ' ehalf of the Beef Board." *See* http://www.beefitswhatsfordinner.com/footer/aboutus.asp. The site describes the NCBA as the "nonprofit domestic planning and marketing organization responsible for increasing demand for U.S.-produced beef" that "works on behalf of America's Beef Producers and is contracted by the Cattlemen's Beef Promotion and Research Board." *See* http://www.beefitswhats fordinner.com/askexpert/default.asp.

and has likened the program to a corporation with beef producers as the "shareholders," which, like any private corporation, is subject to government oversight to "ensure program accountability." J.A. 81, 89, 101-102. Advertisements financed under the Beef Act often carry the copyright insignia of the "National Cattleman's Beef Association and Cattlemen's Beef Board" and often purport to be made in the name of "America's Beef Producers." J.A. 51-53.[3] In promotional materials that are directed to beef producers, the Beef Board often refers to the program as "our beef checkoff" and suggests that the program represents the interests of all beef producers. J.A. 93, 89-94.

Respondents, who do not believe the beef program represents their interests and do not agree with the advertising under the program, brought suit after trying in vain to convince the Secretary to conduct a referendum under 7 U.S.C. § 2906(b) so that they could attempt to convince other producers to vote the program down. Respondents believe that American beef is superior to imported beef and object to being required to fund advertising that suggests that all beef is the same. Respondents also object to being required to associate for expressive purposes with the Beef Board, the NCBA, and other producers who hold different views about beef and how best to promote it. J.A. 34-37; 58-80. The district court ruled that the Beef Act and order violated the First Amendment by requiring beef producers to fund speech with which they disagree. Pet. App. 31a-61a. The Eighth

[3] The Beef Board's website, http://www.beefitswhatsfordinner.com, carries the copyright insignia "© Cattlemen's Beef Board" and states that the site is "Funded by America's Beef Producers."

Circuit affirmed. *Id.* at 1a-30a. The court rejected the Secretary's argument that the Beef Act amounted to a program of government speech, concluding instead that the Act compelled individuals to finance a program of private speech. The court then concluded that the Beef Act failed intermediate scrutiny under the First Amendment because the government's interest in promoting beef was not sufficiently substantial to justify the infringements on dissenting producers' First Amendment rights. *Id.* at 28a.

SUMMARY OF ARGUMENT

It has long been clear that the First Amendment protects not only the right to speak freely but the right to refrain from speaking; not only the right to associate freely with others, but the right to refrain from associating. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1976); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977). Equally clear is that just as the government may not prohibit individuals from funding speech or expressive associations with which they agree, so it may not compel them to do so when they dissent. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1, 9-10 (1990). In the words of Thomas Jefferson, on which this Court has relied in the past, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.* at 10 (quoting *Abood*, 431 U.S. at 234-35 n. 31).

While the primary focus in this case has been on the Beef Act's implications for Respondents' rights of free speech, checkoff programs like that authorized under the Beef Act have serious implications for the fundamental

right of association as well. Freedom of association arises from the fact that to exercise the other rights protected under the First Amendment, individuals must often associate and make common cause with others. Accordingly, this Court's precedents establish unequivocally that the First Amendment protects individual autonomy to choose whether to associate with others and what messages to promote. In this manner, the right of association protects not only freedom of conscience, but the free and open debate and diversity of views that is vital to our republican form of government. Thus, government violates the right of association just as much when it compels individuals to associate as when it prevents them from associating.

The Beef Act works a significant infringement on beef producers' right of association. The expressed purpose of the Beef Act is to compel *all* beef producers to engage in a concerted effort to promote beef, whether they wish to or not. Individual producers must finance that effort, whether or not they agree with its messages and goals and whether or not they agree with the various associations that set the agenda under the Beef Act and decide what messages to promote. While it is common to describe advertising under the Beef Act as "generic" because it promotes beef as a generic product, the Beef Board and Operating Committee enjoy broad discretion to create promotional and advertising programs that make a wide variety of claims and contain different messages. There is, in short, much for dissenting producers to object to. Moreover, advertising and promotional materials financed by the Beef Act often contain the label "Sponsored by America's Beef Producers," thus attributing views and positions to all beef producers, even those who disagree.

Indeed, the Beef Act is mandatory precisely because the government and beef producers who support the Act's goals feared that advertising in the industry would falter if individual producers were left free to decide their own message and how best to promote their products.

Thus, the very premise on which the Beef Act operates – the assumption that government and certain beef producers know best what messages to adopt and are entitled to speak for the entire industry – is anathema under the First Amendment. As this Court has made clear many times in many different context, the core assumption of the First Amendment is that individual speakers and listeners decide whether and when to speak and what to say, not government. This principle applies as much to beef producers in their efforts to promote, or not promote, their products as it does to anyone else.

ARGUMENT

I. FREEDOM OF ASSOCIATION IS A FUNDAMENTAL RIGHT THAT PROMOTES THE DUAL VALUES OF FREEDOM OF CONSCIENCE AND DEMOCRATIC SELF GOVERNMENT.

The right of individuals to associate to express opinions and advance beliefs is one of the fundamental freedoms the First Amendment protects. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purposes of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond dispute that freedom to engage in association for the advancement of beliefs and ideas is an

inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). The right of association arises from the fact that the effective exercise of other liberties protected under the First Amendment often requires group effort. As this Court has stated,

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

The right of association thus performs a dual function under our constitutional system. First, it protects freedom of conscience by leaving to individuals the choice to join or not to join with others to express views on matters of importance to them. *See Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995). As this Court has stated, "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Elrod v. Burns*,

427 U.S. 347, 356 (1976) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Second, freedom of association preserves our republican form of government by promoting a diversity of views and free and open competition in the marketplace of ideas. Protections for the related rights of association and speech "reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . a principle itself reflective of the fundamental understanding that '[c]ompetition in ideas and governmental policies is at the core of our electoral process.'" *Elrod*, 427 U.S. at 357.

Fundamental to freedom of expressive association, therefore, is freedom of choice in one's associations. As this Court made clear in both *Hurley*, 515 U.S. at 557, and *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000), this includes the choice to associate when one finds common cause with others, as well as the choice *not to* associate when one disagrees. A "fundamental rule of protection under the First Amendment," as this Court stated in *Hurley*, is "that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. Compelling individuals to associate with those who hold different or opposing views is tantamount to compelling them to affirm a belief that they do not hold. *See Elrod*, 427 U.S. at 356. *See also Dale*, 530 U.S. at 654 ("the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control"). In short, "[f]reedom to associate . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. *See also Hurley*, 525 U.S. at 573 ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'.").

Government infringes the freedom of expressive association not only when it actively coerces individuals to associate, but also when it compels individuals to pay financial support to a group that advocates causes to which they object. Thus, in *Abood v. Detroit Bd. of Education*, this Court held that a state could not compel non-union teachers to pay for a union's political activities, even though the state could constitutionally require the teachers to pay for the union's collective bargaining activities under an exclusive agency-shop arrangement. 431 U.S. at 235-36. Allowing one union to act as the exclusive bargaining agent for all teachers, the Court found, was vital to avoiding the "confusion and conflict" that could arise if rival unions were permitted to represent different factions of teachers. Requiring non-union teachers to pay service fees for the union's collective bargaining activities thus served compelling state interests. *Id.* at 225. *Accord Keller v. State Bar of California*, 496 U.S. 1, 13 (1990) (noting that agency-shop arrangements serve "vital national interests in preserving industrial peace"). Compelling dissenting teachers to pay for expressive activities unrelated to collective bargaining, however – activities such as political campaigning and lobbying – violated the teachers' freedom of speech and association protected by the First Amendment. *Abood*, 431 U.S. at 235-36. As the Court stated in *Abood*,

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he

> will, and that in a free society one's beliefs should be shaped by his mind and his conscience, rather than coerced by the State.

Id. at 234-35. *Accord Elrod*, 427 U.S. at 356 ("The financial and campaign assistance that [an individual] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief.").

The principle that emerges from these decisions is that government may compel individuals to finance group activity only when it has vital purposes for doing so that are unrelated to expression per se, and only when any expressive activities undertaken by the group are germane to such purposes. *See, e.g.*, *Dale*, 530 U.S. at 657-58 (to be constitutional, a law that affects the right of association must not "materially interfere with the ideas" sought to be expressed); *Roberts*, 468 U.S. at 623 (to be constitutional, a law must be "unrelated to the suppression of ideas"); *Keller*, 496 U.S. at 14 (state bar may use mandatory dues to fund only those activities that are germane to regulation of the legal profession).[4]

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[4] Petitioners incorrectly contend that this Court's First Amendment cases impose only intermediate or even more lenient scrutiny on the mandatory assessments under the Beef Act. *See* U.S. Br. at 37; Private Pet. Br. at 39. This argument not only contradicts this Court's compelled assessment cases such as *Abood*, *Keller*, and others, it also conflicts with the Court's other right of association cases, which have squarely held that restrictions on the right of expressive association are assessed under *strict* scrutiny. That is so whether government attempts directly to prevent individuals from associating or to compel them to associate, *see, e.g.*, *Dale*, 530 U.S. at 657-60; *Hurley*, 515 U.S. at 574-81; *Roberts*, 468 U.S. at 623, or its actions indirectly infringe the right of association by, for instance, conditioning public employment on joining

(Continued on following page)

Thus, in *United States v. United Foods*, 533 U.S. 405 (2001), this Court struck down an act nearly identical to the Beef Act because the principal purpose of the law was to compel producers to finance a program of group speech. *Id.* at 415 ("We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself."). While the analysis in *United Foods* focused primarily on freedom of speech rather than freedom of association, the principle applies equally to either right. Speech and expressive association are the *only* purposes of the Beef Act. The Act grants broad authority to a private association of beef producers – the Beef Board, the Operating Committee, and the NCBA – to speak for all beef producers, including those who disagree with the goals and the messages those entities promote. This Court's holding in *United Foods* demonstrates that the bare desire to increase demand for a particular commodity through advertising is not a compelling state interest that can justify requiring dissenting producers to associate for expressive purposes when they wish to remain independent. *Id.* The Beef Act thus violates Respondents' and other dissenting producers' rights to free speech and association.

II. THE BEEF ACT CONFLICTS WITH THE CONSTITUTIONAL VALUES THE RIGHT OF ASSOCIATION PROMOTES.

Petitioners admit that the purpose of the Beef Act is to compel beef producers to engage in a concerted effort to

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or financially supporting a political party, *see Elrod*, 427 U.S. at 356-57, compelling disclosure of membership lists, *see NAACP v. Alabama*, 357 U.S. at 460-61, or restricting activities vital to an expressive association, *see NAACP v. Button*, 371 U.S. 415, 430 (1963).

promote beef as a generic product. Indeed, the program is mandatory precisely *because* the Act's proponents feared that individual producers would not voluntarily choose to advertise their products as the Act's proponents desired. *See* U.S. Br. at 17-18; Private Pet. Br. at 25. Similarly, the costs of the program were foisted on beef producers precisely *because* its proponents feared that taxpayers would not support the Act's goals if it were funded out of general revenues. *See* U.S. Br. at 29. Petitioners euphemistically describe the compulsion at the root of the Act as a solution to the "collective action" or "free rider" problems. *See* U.S. Br. at 17-18, 29; Private Pet. Br. at 44. One might more accurately describe it as an effort to squelch dissent. Whatever labels are used, however, the Beef Act compels producers to associate for expressive purposes with those whose views they oppose. The Act thus contravenes the constitutional values the right of association was designed to promote, and violates dissenting producers' First Amendment rights.

A. The Implicit Assumption Of The Beef Act Is That Government And Certain Producers Are Entitled To Speak For The Entire Industry.

Central to Petitioners' argument is that all beef producers' interests in promoting their products are identical and that no rational producer could object to the promotional programs the Beef Act mandates. Thus, the Secretary argues that it is appropriate for the government to compel producers to associate and to bear the costs of advertising and promotion under the Beef Act because producers "could reasonably be presumed by Congress to benefit from and agree with the central message of the

program – the 'desirability of beef and beef products'." U.S. Br. at 39. *See also id.* at 30 (arguing that beef producers "derive a particular benefit from the program").

This argument ignores the central premise of the First Amendment. The "general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 411 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). That principle applies whether the right at issue is speech per se or expressive association. As the Court made clear in *Hurley*, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." 515 U.S. at 576.

The autonomy at the root of freedom of association means that individuals need not justify their objections to some authority in order to exercise their right not to associate for expressive purposes. As this Court explained in *United Foods*, even though objections about the marketing of particular commodities may seem minor to some, "those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important to them as it is for other discrete, little noticed groups in society which values the freedom resulting from speech in all its diverse parts." 533 U.S. at 410. Thus, neither the courts nor the government may judge the sufficiency of an individual's objections before they are permitted to exercise their right to dissent. *See, e.g., id.* at 413 ("speech need not be characterized as political before it receives First Amendment protection"); *Dale*, 530 U.S. at 651 ("it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent);

Abood, 431 U.S. at 232 ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection"); *NAACP v. Alabama*, 357 U.S. at 460-61 ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing freedom to associate is subject to the closest scrutiny.").

In any event, there are legitimate reasons for beef producers to object to the advertising and promotional programs under the Beef Act. As Respondents here point out, the Beef Act promotes beef as a generic product. Respondents, however, believe that American beef is superior to imported beef and that particular types of beef are superior to others. J.A. 34-37; 58-80. The advertising and promotional programs they are compelled to finance under the Beef Act thus directly contravene their interest in distinguishing their products from others. The Beef Act also requires Respondents to associate with the Beef Board, the Operating Committee, and the NCBA. The NCBA in particular is a private trade association composed of only 40,000 beef producers. Respondents do not agree with the goals of the NCBA and object to being required to associate with it. J.A. 38.

Promotional materials created under and funded by the Beef Act also make specific claims that many producers might find objectionable. For example, on its website the Beef Board promotes irradiation as a means of promoting

food safety.[5] The Board also sponsors a website called "zip4tweens.com" whose stated purpose is to "help tween girls (about 8 to 12 years old) see the value of eating smart and being physically active."[6] Not surprisingly, the website advocates beef as an important part of every young girl's diet.[7] Like many of the promotional materials funded by the Beef Act, the website states prominently that it is "Sponsored by America's Beef Producers," thus attributing the views expressed to all beef producers, including those who object to the advertising under the Act. *Cf. Hurley*, 515 U.S. at 580 (relying on the possibility of misattribution of a message to those who object as one factor in finding unconstitutional a law that required the sponsors of a parade to allow other groups to march).

Whether claims such as these are true, false, good, or bad is beside the point. Doubtless, many producers agree with these claims. Others, such as Respondents, clearly do not. What matters for First Amendment purposes is that the Beef Board and Operating Committee enjoy broad discretion to fund advertising that makes a wide variety of claims, yet dissenting producers cannot withdraw their support from that advertising regardless of what messages

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[5] *See* Beef Checkoff Educates Consumers About Irradiated Beef, May 12, 2004 (available at http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1054&contentId=2622&contentTypeId=2). *See also* http://www.beefboard.org/documents/irradiation.pdf.

[6] *See* http://www.zip4tweens.com/why.html.

[7] *See, e.g.*, http://www.zip4tweens.com/why.html ("Alarmingly, less than 1% of teen girls meet the nutrition guidelines of the Food Guide Pyramid. Beef is an important member of the Pyramid's meat group and provides several key nutrients often lacking in the diets of girls and young women."); http://www.zip4tweens.com/along/cognition.html ("Protein helps your brain work. Protein is found mostly in foods from the meat and dairy group.").

it promotes.[6] Under the First Amendment, the choice to fund or not to fund a particular message is up to the individual, not the government or a majority of beef producers.

It is no answer to claim, as Petitioners do, that the Beef Act solves a "collective action" or "free rider" problem. *See* U.S. Br. at 17-18, 29; Private Pet. Br. at 44. Even if that were true, the argument simply begs the constitutional question at issue in this case. To say that dissenting producers might "free ride" off of the advertising of others presumes that they receive a benefit for which they are not paying. Implicit in that conclusion, however, is that dissenting producers have no legitimate disagreement with the message and no reason to dissent from the expressive activities of the group. Yet that is precisely the judgment that the First Amendment prohibits the government from making. It "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 579. As this Court stated in *Hurley*, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* What

[6] Advertising and promotional programs funded under other agriculture promotional acts make similar types of claims. For instance, the federal dairy promotion program is currently sponsoring advertising as part of the "got milk" campaign that claims that consuming dairy products promotes weight loss. *See, e.g.*, http://www.2424milk.com/ ("Milk your diet. Lose weight!"); http://www.whymilk.com/moms/images/weightloss_ad.jpg ("Drink Milk. Lose Weight?"). Promotional materials sponsored under the pork promotion program claim that "Pork's perfect for low-carb diets." *See* http://www.otherwhitemeat.com/allaboutpork/nutrition/porksPerfect.htm.

Petitioners call "free riding" is, to producers who disagree with the advertising and promotional activities under the Beef Act, simply a derogatory expression for "dissent." If the government and beef producers who support the Beef Act wish to solve this so-called "problem," they must do so within the confines of the First Amendment, through cooperation, discussion, and debate, rather than coercion.[9]

At bottom, the Beef Act is founded on the presumption that the government – or the Beef Board, or the Operating Committee, or the NCBA, or the majority of beef producers, or some combination thereof – knows what is best when it comes to promoting beef and may appoint a group of beef producers to speak for the entire industry. This Court has consistently rejected such presumption and paternalism in the realm of free speech in the past. "[G]overnment, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 791 (1988). *See also*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996)

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[9] Petitioners' reliance on *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), for the proposition that the Beef Act can be justified by the government's "vital" interest in avoiding free riders is misplaced. *See* U.S. Br. at 40; Private Pet. Br. at 44. *Lehnert*, like *Abood*, involved the extent to which a union's expressive activities were related to *non-expressive* activities for which teachers could be compelled to pay union fees. The principle purpose of the mandatory fees in *Lehnert* was not speech per se, but facilitating collective bargaining, and this Court upheld only those activities that were germane to that purpose. *Id.* at 520-28. Here, by contrast, the principle purpose of the compelled subsidies is speech. Whether the claimed purpose of the beef program is to prevent "free riding" or simply to compel producers to pay special subsidies on the side the government favors, the program is still unconstitutional under *United Foods*.

(stating that the First Amendment counsels skepticism of government efforts to regulate speech for the public's own good); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("It is precisely the kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."). There is no reason to abandon that sound principle here.

B. The Beef Act Skews The Democratic Process Against Dissenting Producers.

Freedom of association is vital to the "competition in ideas" and diversity of views that forms the "core of our electoral process." *Elrod*, 427 U.S. at 357. The Beef Act undermines the protective benefits of the right of association in this context in two ways. First, as argued above, by requiring individual beef producers to associate with those with whom they disagree, the Beef Act enforces a sort of viewpoint orthodoxy as to what messages are promoted about beef and the industry in general. This runs directly contrary to this Court's admonition in *United Foods* that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." 533 U.S. at 411.

Second, the Beef Act actively inhibits dissenting producers' ability to convince other beef producers and even taxpayers to oppose the program and seek its repeal. After Respondent Livestock Marketing Association ("LMA") initiated a petition drive to obtain a referendum on continuation of the program under 7 U.S.C. § 2906(b), the Beef Board began actively promoting the Beef Act to

producers. These producer communications described the beef program as a "state-based," "industry-wide self-help tool" created and operated by and for beef producers and overseen by an "independent organization of 111 'grass-roots' volunteers," and claimed that it is the "only industry-wide self-help tool cattlemen have to promote beef now and in the future." J.A. 81-93. In other communications, the government described checkoff programs as "similar to businesses, funded by shareholders . . . with a board of directors that is accountable to the shareholders," and stated that they are "funded entirely by their respective industries, NOT by taxpayers or government agencies." J.A. 101-02 (emphasis in original). *See also* J.A. 102 (claiming that checkoff programs "operate much like corporate businesses, with oversight by the federal government to ensure program accountability. In fact, checkoff programs reimburse the [USDA] for its oversight responsibilities.").

The point of these communications was obviously to convince beef producers and taxpayers not to oppose the Beef Act. *See* U.S. Br. at 29 (stating that the purpose of structuring the beef program as an industry-funded program was to prevent taxpayer opposition). While it is perfectly appropriate for individual beef producers to promote the Beef Act to others if they so choose, it is particularly insidious and undemocratic to require those who oppose the program not only to finance advertising with which they disagree, but to finance their opponents in a political debate about whether the program should continue.

Seen in this light, the Secretary's claims that Respondents should seek change under the referendum provisions of the Act or through the broader political process, rather

than in court, ring particularly hollow. *See* U.S. Br. at 19, 31-32. In the referendum process, dissenting producers face a Beef Board and Operating Committee armed with millions of dollars in mandatory checkoff funds – including dissenting producers' *own money* – that they can use to convince other producers that the dissenter's complaints are unfounded. If dissenting producers appeal to the broader political process, they will find taxpayers with no stake in the debate who have been told that the beef program is a private industry program, operated by and for private producers, and funded by private donations, rather than tax revenues. One would be hard pressed to conceive of a law better designed to favor the views of the majority and to squelch any dissent.

The Beef Act thus interferes with the free and open debate that is fundamental to our democratic system of government. As this Court has stated, the "illuminating source" to which we must turn in solving the inevitable conflicts among individuals that arise in a constitutional republic "is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." *Elrod*, 427 U.S. at 372. While it is perfectly appropriate for like-minded beef producers to associate in order to promote their products and their views about the industry in general, the First Amendment requires "that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well." *Id.*

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge this Court to affirm the decision of the Eighth Circuit and hold the Beef Act unconstitutional under the First Amendment.

Respectfully submitted,

WILLIAM H. MELLOR
STEVEN M. SIMPSON
Counsel of Record
SCOTT G. BULLOCK
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

October 15, 2004

Counsel for Amici Curiae Joseph and Brenda Cochran and the Institute for Justice

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Nos. 03–1164, 03–1165

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ANN VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
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Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE THAD COCHRAN, BOB GOODLATTE, AND CHARLES W. STENHOLM IN SUPPORT OF PETITIONERS

DAVID A. BONO
(Counsel of Record)
GERALD P. NORTON
JAMES G. RAFFERTY
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
801 Pennsylvania Ave., N.W., Ste. 600
Washington, D.C. 20004–2615
(202) 973–7600

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder--which impose assessments on beef producers and importers to fund research, education, and promotional activities carried cut by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives under the direct supervision and control of the Secretary of Agriculture--are "unconstitutional and unenforceable."

2. Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§ 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioners.[1]

INTEREST OF AMICI CURIAE

Senator Thad Cochran and Representatives Bob Goodlatte and Charles W. Stenholm (hereinafter referred to as the "*Amici*") are all Members of the 108th Congress. Sen-

[1] Pursuant to Rule 37, Petitioners and Respondents have consented to the filing of this brief. Their consent letters are on file with the Clerk. No counsel for any party authored this brief, either in whole or in part. No persons other than *amici curiae*, or their Counsel of Record, have contributed financially to the preparation of this brief.

ator Cochran is the Chairman of the Senate Committee on Agriculture, Nutrition and Forestry. Representatives Goodlatte and Stenholm are, respectively, Chairman and Ranking Minority Member of the House Committee on Agriculture. As such, *Amici* engage in congressional oversight of the Department of Agriculture, including its responsibilities under the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*, and other statutes and regulations that affect the beef industry or provide for generic promotions of other agricultural commodities. *Amici* have also played a direct role in the enactment of legislation at issue in this case, and each represents many constituents who either depend on the beef industry for their livelihood or benefit from public information and research on beef products as consumers.

For almost 70 years, Congress has employed various mechanisms that provide for the generic promotion of beef and other agricultural commodities. Congress has consistently viewed such generic promotion as a critical part of its efforts to both promote healthy diets and provide stability and security to the cyclical agricultural economy. That stability benefits not only the millions of Americans who rely on the agricultural economy for their livelihoods, but also the American economy generally.

The Beef Act is thus not the first example of a Congressional enactment that has provided for the generic promotion of beef. Generic promotion has long been used by government to balance the demand for agricultural products with frequently overabundant supply. The Beef Act provides a mechanism, administered by the Secretary of Agriculture and subject to congressional oversight, for beef's generic promotion.

By virtue of their congressional oversight responsibilities, *Amici* are familiar with the operation and effectiveness of the Beef Act in the 19 years since its enactment. In their view, it is an example of how government can use persuasion effectively to implement policy decisions with efficiency and without displacing market forces. Indeed, the leading study of the Act's effectiveness estimates a

rate-of-return of $5.67 for every dollar expended on generic beef promotion. *See* Dr. Ron Ward, *The Beef Check-off Impact on U.S. Beef Demand*, 50 YEARS OF PROGRESS–WHAT DOES THE FUTURE HOLD?, at 39–46 (Proceedings of the 50th Ann. Univ. of Fla. Beef Cattle Short Course, 2001).

However, the Court of Appeals' decision in this case invalidated the Beef Act in its entirety. *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003). The Court of Appeals elevated the commercial preferences of a small minority of beef industry participants above the policy decisions of Congress. If allowed to stand, this decision would override Congress's judgments concerning the needs of the Nation's beef market and suppress the government speech called for in the Beef Act.

Amici believe that the Court of Appeals' decision imperils the Government's ability to communicate its views to the American people. Through the democratic processes, federal legislation has been enacted to disseminate the Government's determinations with respect to the nutritional and economic value of beef consumption. The decision of the Court of Appeals, if left to stand, would repress government speech and frustrate the important public policies served by the Beef Act.

Amici fully endorse the substantive constitutional analysis set forth in the Petitions. In addition, *Amici* believe that an examination of both the context of the Beef Act's enactment and its design may serve to illuminate the application of the government speech doctrine in this case. *Amici* therefore seek to provide information to the Court respecting the governmental viewpoint that Congress intended to promote in the Beef Act and the mechanism that Congress chose for the pursuit of that government speech. *Amici* further seek to highlight the dangerous practical implications of the Court of Appeals' decision for the Government's ability to communicate effectively with the American people on nationally significant policy matters.

SUMMARY OF ARGUMENT

As set forth in the Petitions, the Court should find that the Beef Act's generic promotion program is government speech unconstrained by the First Amendment. Congress has long been of the view that the generic promotion of beef is a governmental matter of national significance, for reasons that include nutrition and the need to balance demand with frequently overabundant supply. Congress has therefore provided mechanisms for the generic promotion of beef and other agricultural commodities.

The earliest such federal program began during the Depression and continued until the mid-1970's. The United States Department of Agriculture ("USDA"), under authority of a Congressional enactment, directly formulated and disseminated generic promotions of beef and various other agricultural commodities.

Currently, generic beef promotion proceeds under the direct supervision of the Secretary of Agriculture, who, under the Beef Act, is responsible for appointing a Beef Board and overseeing and approving its efforts to implement the generic promotion authorized in the Act. In either case, generic agricultural promotion is being undertaken pursuant to federal law, under the authority of the federal government, and in pursuit of important governmental policies that are embodied in federal statutes and regulations.

There can be no serious question that, when USDA undertook direct generic promotions of beef and other agricultural commodities, it was engaging in government speech that could not be restrained on First Amendment grounds. *Amici* respectfully submit that the Court should draw the same conclusion with respect to the generic beef promotion that has been undertaken under authority of the Congressionally-enacted Beef Act and the active supervision and oversight of the Secretary of Agriculture. Congress is democratically accountable to the American people for its decision to engage in this communication, and the Court should hold that the message Congress has

chosen in the Beef Act should not be suppressed based on the objection of a minority of beef producers.

ARGUMENT

The decision of the Court of Appeals should be reversed. As set forth in the Petitions, the generic promotion program enacted by Congress and implemented under the Secretary of Argriculture is government speech, which is not constrained by the First Amendment. Even if constrained by the First Amendment, it would be constitutional under the intermediate scrutiny applicable to regulation of commercial speech. The blanket injunction that the Court of Appeals upheld against implementation of the Act, including its research and information aspects, was also overbroad.

Amici believe they can be most helpful to the Court by explaining how promotional activities under the Beef Act constitute government speech. The history, context, and implementation of the Beef Act demonstrate that it has long been Congress's decision that the generic promotion of beef and other agricultural commodities is a governmental matter of national significance. Congress has also maintained statutory structures that vest the Secretary of Agriculture with ultimate decision-making authority over the generic promotion of beef. The Court should therefore find that generic beef promotion under the Beef Act constitutes government speech that is not constrained by the First Amendment.

I. THE HISTORY, CONTEXT AND IMPLEMENTATION OF THE BEEF ACT DEMONSTRATE THAT CONGRESS'S DECISION TO PROMOTE BEEF GENERICALLY INVOLVES GOVERNMENT SPEECH IN PURSUIT OF PUBLIC POLICY OBJECTIVES, NOT FACILITATION OF PRIVATE SPEECH

The Beef Act reflects Congress's considered judgment that the consumption of beef is in the public interest. It also embodies Congress's view that this goal is best pursued through the generic promotion of beef. In imple-

menting a governmental program of generic beef promotion, Congress specifically vested the Secretary of Agriculture with authority to appoint a Beef Board, and it also granted her supervisory control over that Board. This Court should find that generic beef promotions undertaken pursuant to the Beef Act constitute government speech.

A. The History of Government Speech Generically Promoting Beef and Other Agricultural Commodities.

Successive Congresses and Administrations have determined that a healthy diet and a stable and prosperous agricultural economy are both important governmental objectives. They have also determined that, in matters of food consumption policy, advice and persuasion are often the most appropriate and effective tools. Consequently, agricultural producers and consumers alike have benefited from almost 70 years of federal programs that generically promote beef and various other agricultural commodities.

The earliest federal program for the generic promotion of beef and other agricultural commodities grew out of the Great Depression and continued for approximately thirty-five years. From 1939 until the mid-1970's, the USDA engaged in the direct generic promotion of beef and other agricultural commodities through the "Plentiful Foods Program." USDA officials formulated the content of Plentiful Foods Program generic promotions and directly undertook the dissemination of that content.

The Plentiful Foods Program proceeded under authority of Section 32 of the Act of August 24, 1935 (commonly referred to as "Section 32"). *See* Pub. L. No. 74–320, 49 Stat. 750, 774 (1935) (codified as amended at 7 U.S.C § 612(c)). Congress enacted Section 32 during the Depression, "to assist farmers suffering from price-depressing surpluses." GEOFFREY S. BECKER, FARM AND FOOD SUPPORT UNDER USDA'S SECTION 32 PROGRAM, at 1 (Congressional Research Service Report 20235) (1999). Section 32 created a permanent appropriation equal to 30 percent of

annual U.S. customs receipts in order to fund programs to, *inter alia*, "encourage the domestic consumption" of "agricultural commodities and products thereof," including beef, "by increasing their utilization." 49 Stat. at 774.

USDA, in turn, undertook the Plentiful Foods Program to "work[] with the food trade to promote the distribution and consumption of those foods . . . which are in surplus supply." H.R. REP. NO. 83–1770 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2477, 2481, 2484, 2486. *See generally* OFFICE OF ECONOMIC DEVELOPMENT, CATALOG OF FEDERAL DOMESTIC ASSISTANCE (1970) at 4–70 (Plentiful Foods Program "assists producers and marketing groups in stimulating special merchandising efforts and consumer interest in seasonally available and other abundant foods"). For approximately thirty-five years, USDA officials engaged in whatever direct generic promotion they deemed necessary to induce consumer demand for beef and other agricultural products that were in surplus supply. *See e.g.*, Bob Talbert, *Mustard, Two Slices of Bread, and A Lazy Earl named Sandwich*, DETROIT FREE PRESS, Aug. 18, 1969, at 11 (reporting on "the Department of Agriculture crowd promoting National Sandwich Month with such submarines as a 7-foot, 75-pounder which fed 300 people at Boyne Mountain"). *See generally Agriculture–Environmental and Consumer Protection Appropriations for 1973: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 92nd Cong. 738 (1972) ("effectiveness of the program depends upon the direct contact which field workers employ on a continuing basis"); JOHN P. DOLL, V. JAMES RHODES, JERRY G. WEST, ECONOMICS OF AGRICULTURAL PRODUCTION, MARKETS, AND POLICY, at 455–56 (Richard D. Irwin, Inc., and Irwin-Dorsey Ltd., eds., 1968) (Plentiful Foods Program "primarily informational in nature").

For example, as part of the Plentiful Foods Program, USDA produced and disseminated a monthly *Smart Shopper Food Guide* publication "to help agricultural producer groups and the food trade industry market food abundance through normal channels of trade-by calling

consumer attention to the time for buying foods at the peak of quality, and most attractive prices." USDA CONSUMER AND MARKETING SERVICE, SMART SHOPPER FOOD GUIDE (Aug. 1969) (promoting consumption of, *inter alia*, "variety meats," "luncheon meats," "canned chopped meat," and "canned meat"). *See generally Agriculture–Environmental and Consumer Protection Appropriations for 1974: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 93rd Cong. 517 (1973) ("The *Smart Shopper Food Guide* reflects current smart buys (utilizing Plentiful Foods, where applicable) for the current month, as an aid in helping family food shoppers select a balanced and varied diet.") USDA also issued monthly lists of foods in plentiful supply, which were sent to news outlets along with press releases that contained recipes and story lines to be used as the basis for consumer-directed features and articles. *See, e.g., Plentiful Foods List: Variety Keynotes August Selection*, DALLAS MORNING NEWS, July 31, 1969, at 6–E ("Wide selection is the key to the August plentiful foods list of the U.S. Department of Agriculture.").[2] Consumers came to rely on the Plentiful Foods

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[2] *See also Plentiful Foods for August*, SPARTANBURG HERALD, Aug. 14, 1969, at 38 (reporting that "[s]tocks of wheat were estimated recently as 32 percent greater than last year.... USDA's Consumer and Marketing Service says that, in addition to wheat products, its August plentiful foods list contains many other items."); *USDA Report–Nutritious Wheat for Daily Food*, DALLAS TIMES HERALD, Aug. 14, 1969, at 24 ("The U.S. Department of Agriculture's Consumer and Marketing Service reports plentiful supplies of wheat and wheat products, and that includes bread."); *Tasty Sandwiches for Summer Spread*, NATCHEZ DEMOCRAT, Aug. 17, 1969, at 9 ("USDA's Consumer and Marketing Service reports good supplies of wheat products, plus tasty sandwich fillings like peanut butter, fresh summer vegetables and onions."); *Sandwich Month of August Promises Excellent Eating*, DALLAS MORNING NEWS, Aug. 7, 1969, at 2–E ("reported plentiful by USDA's Consumer and Marketing Service are peanuts and peanut products, fresh pears, nectarines, watermelons, limes, summer vegetables and onions."); *Sandwiches Are For Everybody*, JACKSON DAILY NEWS, Aug. 7, 1969, at 55 (because "wheat products are in particularly abundant supply, economy-minded homemakers will find sandwiches a wise choice for family meals, USDA's Consumer and Marketing Service ad-

Program's generic promotion of beef and other foods when making consumption choices. *See, e.g.*, Rubye Smith, *List of Plentiful Foods Is Valuable Aid To Homemakers and Institutional Buyers,* PARIS POST-INTELLIGENCER, Aug. 12, 1969, at 7 ("Homemakers and Institutional food buyers have found that the monthly list of plentiful foods from the United States Department of Agriculture can be a valuable aid. As a rule, foods in best supply can help stretch the food dollar to the best advantage. Too, there's usually a better selection from foods in good supply.")

The governmental generic promotions undertaken through the Plentiful Foods Program were directed towards balancing consumer demand with cyclical supplies of beef and various other agricultural commodities, which were often overabundant. By focusing the attention of consumers and large-scale food buyers on beef or other particular agricultural products at the critical time, the Plentiful Foods Program stimulated sales when peak supplies were moving to market. And, by successfully stimulating demand, the Plentiful Foods Program avoided large-scale government purchases to remove surplus supply from the market, thereby stabilizing producer prices, the agricultural economy, and the broader American economy without displacing market forces.

When USDA ended the Plentiful Foods Program in the mid-1970's, Congress enacted a voluntary program that allowed generic beef promotion, *see* Beef Research and Information Act, Pub. L. No. 94–294, 90 Stat. 529 (1976), but experience taught that such voluntary measures were not "effective" in "helping balance supply and demand." S. REP. NO. 99–145 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1677. Therefore, in 1985, Congress enacted the Beef Act, the purpose of which was "to provide, as far as it can be done in legislation of this kind, the basis for an eco-

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vises."); *August is Sandwich Month,* MOBILE REGISTER, Aug. 14, 1969, at 22 ("Stocks of wheat were estimated recently as 32 percent greater than last year and 59 percent more than two years ago. USDA's Consumer and Marketing Service says that, in addition to wheat products, its August plentiful foods list contains many other tasty items").

nomic climate in which efficient American family farmers can survive the grim squeeze that has already driven too many of them to or close to the brink or ruin." H.R. REP. NO. 99–271(I) (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1111. With respect to cattle farming in particular, Congress found that the experiment with a voluntary beef checkoff program had failed to achieve a sustainable balance between beef supplies and beef demand. "Despite decreasing cattle numbers, fed cattle prices are now (summer of 1985) at the lowest point in 7 years. In addition, per capita consumption of beef has dropped drastically." *Id.* at 1289. As a result, "[t]he beef cattle industry continue[d] to face cash-flow problems and eroding equities." *Id.* at 1113.

The legislative history of the Beef Act also demonstrates that Congress's concern was not limited to only cattle producers or even just the agricultural economy. To the contrary, Congress found that "farmers are not alone in feeling the effects of the current situation. Businesses, banks, and local institutions up and down a hundred main streets have been hurt." *Id.* at 1113. Thus, "[e]ven if we were willing to let important segments of agriculture collapse, we could not afford to do so because of the dangers this would pose to the entire national economy." *Id.* at 1111.

B. Governmental Speech Generically Promoting Beef Through the Beef Act

Congress enacted the Beef Act to implement a governmental program of generic beef promotion that is similar to the generic promotion of beef and various other agricultural commodities under USDA's former Plentiful Foods Program. The Beef Act authorizes generic beef promotion by the Beef Board, a Congressionally authorized entity, whose members all are appointed by the Secretary of Agriculture and which undertakes all of its promotional activities under her direct supervision. It was Congress's decision in the Beef Act to implement generic beef promotion through a Beef Board, and also its decision that the Board be directly appointed and supervised

by the Secretary of Agriculture. This Court should conclude that generic promotions under the Beef Act are government speech.

The text of the Beef Act sets forth the governmental purpose behind generic beef promotion. Congress enacted the Beef Act for the express purpose of serving "the public interest," 7 U.S.C. § 2901(b), including the public interest in the "maintenance and expansion of existing markets for beef." *Id.* § 2901(a)(4). *Accord id.* § 2901(b). Congress specifically determined that the best way to pursue its policy goals was a "program of promotion and research designed to strengthen the beef industry's position in the marketplace." *Id.* § 2901(b).

Congress vested the Secretary of Agriculture with responsibility for overseeing the implementation of the important governmental policies embodied in The Beef Act. Thus, as noted, the Secretary is responsible for the composition of the Beef Board. She appoints members of the Beef Board after considering nominations from organizations deemed eligible under Congressionally mandated criteria. *See* 7 U.S.C. §§ 2904(1), 2905; 7 C.F.R. § 1260.141(b). The Secretary also retains the power to remove members from the Beef Board. 7 C.F.R. §§ 1260.211(b)(1), 213.

The Secretary's discharge of these appointment and removal powers demonstrates that she has exercised the critical supervisory responsibilities that Congress has vested in her. She has rejected applications of organizations that do not meet the statutory eligibility criteria. She has decertified at least one nominating organization. And the Secretary has removed at least one member of the Beef Board by seeking and accepting that person's resignation. *See Charter v. USDA*, 230 F. Supp. 2d 1121, 1124 (D. Mont. 2002).

The Secretary has similarly exercised her supervisory control over The Beef Board. She requires the Beef Board to give her notice of its meetings, so that she or a representative may attend. 7 C.F.R. §§ 1260.150(m). A USDA representative does in fact attend every meeting of

the Beef Board, its Operating Committee, and its Executive Committee. *See Charter,* 230 F. Supp. 2d at 1126 & 1138. USDA also maintains less formal consultative contacts with the Beef Board to provide feedback at the early stages of the project development process, the result of which is that "[s]ome proposed projects are not developed because . . . most ideas that do not comport with USDA objectives are quelled in their early stages." *Id.* at 1126. These contacts have also afforded an avenue for the USDA to itself create certain generic promotion under the Beef Act, including a USDA-originated initiative concerning minority livestock producers. *See id.*

The Secretary of Agriculture also has budget authority over Beef Act activities and has actively exercised that authority. No budget, plan, project, or contract approved by the Beef Board can become effective until it receives the Secretary's approval, 7 U.S.C. §§ 2904(4)(C), (6)(A), (6)(B); 7 C.F.R. §§ 1260.150(f)-(g); 7 C.F.R. §§ 1260.168(e)-(f), and the Secretary has required that the Beef Board submit to her an audit of its activities for each fiscal period. 7 C.F.R. § 1260.150(a). If the Secretary determines that a Beef Act project does not serve the purpose of the Act, she "denies funding for the project. The government mandates the beef checkoff assessments, and the Secretary of Agriculture maintains control over how the assessments are spent." *Charter,* 230 F. Supp. 2d at 1138 (citation omitted).

The Secretary has exercised her direct control over the Beef Board by promulgating several specific criteria for Beef Act projects. *See* 7 C.F.R. § 1260.169. Moreover, she has exercised this final approval authority by rejecting Beef Board proposals. For example, she rejected the Beef Board's proposal that it undertake a promotional campaign using a statement to the effect of, "Did you ever notice that when a person offers you a strange food, it tastes like chicken?" Such a campaign might have been beneficial to the private interest of the beef industry, but it would have harmed the poultry industry. USDA therefore rejected the Beef Board's proposal, recognizing the

broader governmental interest "in promoting, not disparaging, poultry," *Charter*, 230 F. Supp. 2d at 1138. The Secretary has thus exercised her control over Beef Act activities to insure that governmental speech under the Act not be transformed by the Beef Board into private speech representative of only one segment of the Nation's population.

Another indication that promotional activities undertaken under the Beef Act constitute governmental speech is the regulation providing that any patents, copyrights, inventions, or publications developed using funds collected under the Act are the property of the "U.S. Government as represented by the [Beef] Board." 7 C.F.R. § 1260.215. The Secretary has provided that the federal government is to be considered an owner of the projects and advertisements generated with funds collected under that Act because the Beef Board's promotional activities under the Beef Act are government activities.

Finally, the governmental nature of promotions under the Beef Act is demonstrated by Congress's continued legislative involvement. In the Commodity Promotion, Research, and Information Act of 1996, for example, Congress required the Beef Board and other commodity boards to conduct periodically "an independent evaluation of the effectiveness of the generic commodity promotion programs" and submit those evaluations to the Secretary of Agriculture. Pub. L. No. 104–127, § 501 (c), 110 Stat. 888, 1031 (1996). In this statute, Congress reaffirmed that "[g]overnment-supervised, generic commodity promotion programs" are "in the national public interest and vital to the welfare of the agricultural economy" in that they "further specific national governmental goals, as established by Congress" and operate "under the required supervision and oversight of the Secretary of Agriculture." *Id.* § 501(b). Specifically, generic commodity promotion is "designed to maintain or increase the overall demand for the agricultural commodity covered by the program . . . often by utilizing promotion methods and techniques that individual producers and processors typi-

cally are unable, or have no incentive, to employ," such as "produc[ing] nonideological and commercial communication the purpose of which is to further the governmental policy and objective" while being "of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising." *Id.*

II. AS THE COURT HAS PREVIOUSLY RECOGNIZED, THE FIRST AMENDMENT'S GUARANTEE OF FREE SPEECH DOES NOT RESTRICT GOVERNMENT SPEECH

There can be no serious question that, when the Government directly promoted beef and certain other agricultural commodities under the Plentiful Foods Program, it was engaging in government speech. *Amici* respectfully submit that the same conclusion should be drawn with respect to the generic beef promotion that has been undertaken under authority of the Beef Act and the active supervision and oversight of the Secretary, through the Beef Board that Congress required the Secretary to create.

Neither of the two features of the Beef Act on which Respondents have focused deprives generic Beef Act promotions of their status as government speech. Under the Beef Act, a Congressionally required and governmentally funded Beef Board disseminates the government's chosen message under the supervisory control of the Secretary. Even if the Beef Board were a private actor, however, the Court has previously recognized that communication of government speech through private speakers does not change the governmental character of such speech. *Rust v. Sullivan*, 500 U.S. 173, 192–95 (1991); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

Nor does Congress's choice for funding the Beef Act by per-head assessments alter the conclusion that generic Beef Act promotions constitute government speech. This

Court has long recognized that Congress must be given "broad latitude" in its funding choices, reviewing such mechanisms with particular deference. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983). After noting "a number of recent Congressional enactments designed to make various Federal regulatory programs partially or entirely self-financing," *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 216–16 (1989) (citations omitted), this Court has also stated that, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). In this context, it should be of no moment that Respondents prefer a different policy than that which Congress has determined is appropriate. *See Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.").

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

DAVID A. BONO
(Counsel of Record)
GERALD P. NORTON
JAMES G. RAFFERTY
SIMON A. STEEL
HARKINS CUNNINGHAM LLP

AUGUST 2004

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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE *ET AL.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *ET AL.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE DKT LIBERTY PROJECT, THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, AND THE MEDIA INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT M. O'NEIL
THE THOMAS JEFFERSON CENTER
FOR THE PROTECTION OF
FREE EXPRESSION
400 Peter Jefferson Place
Charlottesville, VA 22911
(434) 295-4784

JULIE M. CARPENTER *
DANIEL MACH
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* Counsel of Record

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INTERESTS OF *AMICI CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that the federal government will restrict these liberties. Because of the DKT Liberty Project's strong interest in protecting citizens from any government overreaching and in defending the constitutional rights of citizens from efforts to deny them, it is well-situated to provide this Court with additional insight into the issues presented in this case.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990, the Center has filed briefs as *amicus curiae* in this Court and numerous state and federal courts in cases that raised important free expression issues.

The Media Institute is an independent, nonprofit research foundation based in Arlington, Virginia. The Institute is one

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[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

of the country's leading voices advocating a strong First Amendment, a competitive communications industry, and excellence in journalism. The Institute has filed *amicus curiae* briefs in the United States Supreme Court and federal courts of appeal in commercial speech and other First Amendment cases. The Institute has also filed comments with the Federal Communications Commission and other regulatory agencies. In addition to court and agency filings, the Institute advocates freedom of speech through publications, conferences, and other programs.

SUMMARY OF ARGUMENT

In striking down the beef checkoff program at issue in this case, the court of appeals engaged in a straightforward application of this Court's recent decision in *United States v. United Foods*, 533 U.S. 405 (2001). In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), this Court had upheld the use of mandatory assessments for generic advertising of California tree fruits. *Id.* at 477. But four years after *Wileman*, the Court invalidated compelled assessments imposed on mushroom growers, finding a clear violation of the First Amendment prohibition on compelled expression. *United Foods*, 533 U.S. at 417. As the court below recognized, the mandatory assessment program in this case is strikingly similar to the scheme invalidated in *United Foods* and therefore suffers from the same constitutional infirmity. Even if *Wileman* retained any validity after *United Foods*, it would not help sustain the beef checkoff program, which bears little resemblance to the highly regulated cooperative marketing scheme upheld in *Wileman*.

In any event, *Wileman* was, in all meaningful respects, superseded by *United Foods*. Although the Court in *United Foods* did not expressly overrule *Wileman*, the analytical foundations of *Wileman* have not survived. First, this Court in *United Foods* squarely rejected *Wileman*'s refusal to apply

the Court's compelled speech cases to mandatory assessment schemes. Consistent with well-settled compelled speech doctrine, *United Foods* confirmed that, in the context of checkoff programs, the First Amendment protects speakers from being forced to subsidize expression to which they object. Second, contrary to the decision in *Wileman*, the Court in *United Foods* made clear that constitutional proscriptions against compelled speech apply fully to commercial expression. In so doing, the *United Foods* Court rejected *Wileman*'s dismissive treatment of the Court's commercial speech cases and repudiated *Wileman*'s conclusion that an underlying commercial motive could insulate coerced speech from First Amendment challenge.

Because the Court's decision in *Wileman* no longer retains any analytical force, it provides no support for the beef checkoff program at issue here.

ARGUMENT

I. EVEN IF STILL VALID, THE *WILEMAN* RATIONALE CANNOT SUSTAIN THE COMPELLED ASSESSMENTS CHALLENGED HERE.

In defending the Beef Act, Petitioners and their *amici* seek support in this Court's decision in *Wileman*. But even assuming *Wileman* retains any vitality after *United Foods* – by no means a certainty, *see infra* Part II – it cannot sustain the checkoff program challenged here, which, as a factual matter, is remarkably similar to the scheme struck down in *United Foods*.

In *United Foods*, this Court distinguished between the regulatory program in *Wileman*, which comprehensively restricted the marketing autonomy of its participants, and a mushroom checkoff scheme that consisted primarily of a generic advertising program. *United Foods*, 533 U.S. at 411-

12. The *Wileman* program restrained the marketing of tree fruits so thoroughly, and "'displaced competition'" so completely, that it was "'expressly exempted from the antitrust laws.'" *Id.* at 412 (quoting *Wileman*, 521 U.S at 461). In that context, the cooperative advertising program in *Wileman* was merely one aspect of a "'broader collective enterprise in which [the growers'] freedom to act independently [was] already constrained by the regulatory scheme.'" *Id.* (quoting *Wileman*, 521 U.S. at 469). By contrast, in *United Foods* – as in this case – no comparable regime of "mandated cooperation" existed; instead, the compelled subsidies in *United Foods* were part of a program "where the principal object [was] speech itself." *Id.* at 414-15.

The beef checkoff program bears little resemblance to the assessments in *Wileman*. The Beef Act neither creates, nor is subordinate to, a comprehensive regulatory scheme. Beef sellers and producers make their own marketing decisions. Indeed, the narrow assessment scheme does not even approach the degree of collective marketing activity that would necessitate an antitrust exemption. Finally, at least half of the funds collected by the Beef Board are used for generic advertising; only 10-12% of those funds are devoted to research. *See Livestock Mktg. Ass'n v. United States Dept' of Agric.*, 335 F.3d 711, 715-16 (8th Cir. 2003). This case thus mirrors *United Foods*. "[F]or all practical purposes," the advertising promoted by the beef checkoff program, "far from being ancillary, is the principal object of the regulatory scheme." *United Foods*, 533 U.S. at 411-12. Accordingly, as in *United Foods*, the compelled speech at issue here cannot withstand Respondents' constitutional challenge.

II. THIS COURT'S DECISION IN *UNITED FOODS* CAST SERIOUS DOUBT ON THE CONTINUED VITALITY OF *WILEMAN*.

Even if *Wileman* otherwise applied to the factual and structural scenario presented here, the doctrinal foundations of *Wileman* have been called into question by the Court's decision in *United Foods*. While the Court in *United Foods* declined to overrule *Wileman*, and expressly distinguished the factual underpinnings of the two cases, the underlying assumptions and conclusions of *Wileman* did not survive the Court's later analysis. For all relevant purposes, *Wileman* has been superseded, and therefore provides no support for Petitioners' defense of the Beef Act.[2]

Although Petitioners and their *amici* rely heavily on *Wileman*, the Court in *United Foods* cast serious doubt on the continued vitality of its earlier decision in two crucial respects. First, *United Foods* rejected *Wileman*'s treatment of the Court's compelled speech cases. In *United Foods*, the Court forcefully applied the compelled speech doctrine generally, and the mandatory dues assessments cases specifically, to federal checkoff programs. Contrary to the suggestions made in *Wileman*, the Court clarified that the government cannot, consistent with the First Amendment, "underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced."

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[2] Although not necessary to the disposition of this case, the Court should take this opportunity to recognize and make explicit the fact that *United Foods* overruled *Wileman*. *Cf. Hudgens v. NLRB*, 424 U.S. 507, 517-18 (1976) (noting that, although the Court in *Lloyd Corp., Inc. v. Tanner*, 407 U.S. 551 (1972), did not expressly overrule *Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) – and, in fact, pointedly distinguished the factual circumstances between the two cases – "the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*").

United Foods, 533 U.S. at 410. Second, *United Foods* declined to follow *Wileman*'s narrow reading of the Court's commercial speech cases. Instead, the Court emphasized that compelled assessments contravene basic constitutional values, even when the speech compelled has an underlying commercial motive.

A. *Wileman*'s Refusal to Apply the Court's Compelled Speech Cases Did Not Survive *United Foods*, and Therefore Cannot Help Justify the Mandatory Checkoff Program Challenged Here.

In defending the Beef Act's mandatory assessment program, Petitioners and their *amici* rely on *Wileman*'s refusal to apply the Court's compelled speech cases to checkoff programs. *See Wileman*, 521 U.S. at 470-71 (citing and distinguishing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986)); *see also Wileman*, 521 U.S. at 469 & n.13. *United Foods*, however, reached the opposite conclusion, noting the central importance of its compelled speech cases to mandatory assessment schemes. *See United Foods*, 533 U.S. at 410.

In particular, this Court in *United Foods* rejected one of the central premises underlying *Wileman* – namely, that the compelled speech doctrine is "clearly inapplicable" to checkoff programs because, according to *Wileman*, "[t]he use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they 'would prefer to remain silent,' or require them to be publicly identified or associated with another's message." *Wileman*, 521 U.S. at 470-71 (quoting *PG&E*, 475 U.S. at 18) (internal citations

omitted). In *Wileman*, challengers to the mushroom checkoff program objected to the message, expressed through the use of coerced advertising funds, that all mushrooms were "the same." 521 U.S. at 468 n.11. While *Wileman* dismissed that objection as "trivial," *id.* at 471; *see also id.* at 472 ("Here, . . . requiring respondents to pay the assessments cannot be said to engender any crisis of conscience."), *United Foods* squarely held that the First Amendment protects producers against compelled speech subsidies "even where the disagreement could be seen as minor." *United Foods*, 533 U.S. at 411.

Notwithstanding *Wileman*, the objections asserted in *United Foods*, like those in *Wileman* and this case, are highly significant for constitutional purposes. As this Court explained:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.

United Foods, 533 U.S. at 411.[3]

In rejecting *Wileman*'s suggestion that these objections raise few constitutional concerns, *United Foods* fit well within the established compelled speech doctrine. With the exception of *Wileman*, the Court's compelled speech cases had never required express, ideological disagreement with

---

[3] As Justice Souter explained, dissenting in *Wileman*, "While these points of disagreement may seem trivial to the Court, they in fact relate directly to a vendor's recognized First Amendment interest in touting his wares as he sees fit, so long as he does not mislead." *Wileman*, 521 U.S. at 488 (Souter, J., dissenting).

the coerced message. Instead, the vital First Amendment right "to refrain from speaking," *Wooley*, 430 U.S. at 714, protects against compelled expression irrespective of the putative speaker's reasons for wishing to remain silent. In this area, the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995); *see also, e.g., Riley v. National Federation of the Blind*, 487 U.S. 781, 797-98 (1988) (the Court's earlier compelled speech cases "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech"); *PG&E*, 475 U.S at 9 (compelled access impermissibly "forces speakers to alter their speech to conform with an agenda they do not set").

Similarly, after *United Foods*, little remains of *Wileman*'s treatment of the Court's mandatory dues assessment cases. In this subset of the compelled speech doctrine, the Court repeatedly has confirmed that the First Amendment limits the government's ability to "compel[] certain individuals to pay subsidies for speech to which they object." *United Foods*, 533 U.S. at 405; *see also, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 527-28 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977). Yet *Wileman* found the dues assessment cases inapplicable to the checkoff program at issue there, *see Wileman*, 521 U.S. at 469-73, primarily based on the conclusion that the challenged assessments were not "used to fund ideological activities," *Wileman*, 521 U.S. at 473; *see also, e.g., id.* at 472 (finding case not "comparable to those in which an objection rested on political or ideological disagreement with the content of the message").

But *United Foods* rejected such a narrow reading of the dues assessment cases. Contrary to *Wileman*, *United Foods* reiterated "*Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection." *United Foods*, 533 U.S. at 413 (citing *Abood*, 431 U.S. at 232). Whether classically "ideological" or not, the coerced subsidy of speech to which one objects offends core constitutional principles. *Id.* at 410-11. *Wileman*'s conclusions to the contrary simply have not survived *United Foods*.

Finally, *United Foods* narrowed *Wileman*'s reliance on the "germaneness" test found in earlier compelled subsidy cases. *Wileman* had applied that test to uphold the challenged checkoff program, reasoning that "the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders." *Wileman*, 521 U.S. at 473 (citing *Abood* and *Keller*). In *United Foods*, however, the Court recognized the inherent limitations of the germaneness inquiry for advertising checkoff programs. By definition, advertising funds used to support compelled cooperative advertising will be germane to the program at issue. "Were it sufficient to say speech is germane to itself," this Court explained, "the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *United Foods*, 533 U.S. at 415.

Thus, *United Foods* essentially rejected *Wileman*'s dismissal of the compelled speech cases, leaving *Wileman* with little analytical support.

B. As This Court Recognized in *United Foods*, the Commercial Nature of Expression Does Not Deprive the Speaker of a First Amendment Right to Resist Government Compulsion to Speak.

This Court's decision in *United Foods* resolved any doubt raised in *Wileman* about whether a commercial speaker

who is compelled to speak can claim any First Amendment protection. *Wileman* could be read as exempting commercial speech from the long-recognized constraints upon government's power to compel expression. *See e.g., Wooley*, 430 U.S. 705 (1977); *Barnette*, 319 U.S. 624 (1943). But *United Foods* restored what surely had been the previous assumption: that a commercial motive on the speaker's part in no way deprives the speaker of a constitutional objection to compulsion imposed by legislative or administrative edict.

This case thus properly invokes *United Foods*' recognition of the abiding principle that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . or from compelling certain individuals to pay subsidies for speech to which they object." 533 U.S. at 410 (internal citations omitted). The explanation for including commercial speech within those safeguards is telling, and is clearly apposite here:

> The fact that the speech is in aid of a commercial purpose does not deprive [the speaker] of all First Amendment protection . . . . The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

Id. This explanation is especially pertinent to the compelled speech issue in this case. As in *United Foods*, "First Amendment concerns [should] apply here because of the

requirement that producers subsidize speech with which they disagree." *Id.* at 410-11.

Such a clear recognition that commercial speech may no more readily be coerced than political speech sets to rest any lingering doubt created by *Wileman*. There, the Court appeared to dismiss commercial speech precedents because they had involved only restrictions or outright bans on expression. Specifically, the *Wileman* Court observed that the absence of "restraint on the freedom of any producer to communicate any message to any audience" served to "distinguish . . . the limits on commercial speech" which had been invalidated in a host of earlier judgments. 521 U.S. at 469 & n.12. The *Wileman* Court also seemed to suggest that commercial speech protection was unavailing where expression was compelled or coerced; a later footnote chided the court of appeals for having "fail[ed] to explain why the *Central Hudson* test . . . should govern a case involving the compelled funding of speech." 521 U.S. at 474 n.18.

So severe a narrowing of First Amendment protection for commercial speech received little analytic support in *Wileman*. The proposition that commercial speech differs in several important respects from political speech required no demonstration; that much has been clear at least since *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). What was not at all clear, however, and found no support beyond *Wileman*'s brief *ipse dixit*, was the suggestion that such differences relate in any constitutionally significant way to the issue of compulsion.

In fact, contrary to *Wileman*'s suggestions, this Court had recognized as early as *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), that a commercial speaker is entitled to raise First Amendment objections to compelled expression. In *Zauderer*, an Ohio

professional ethics rule required that attorneys who made reference to contingent fees in their advertising must disclose that clients still might be liable for certain costs. Recognizing that compelled statements might indeed "offend the First Amendment by chilling protected commercial speech," *id.* at 651, the Court applied a First Amendment analysis, and sustained that legally imposed obligation. *See United Foods*, 533 U.S. at 416 (summarizing *Zauderer*).

In *Zauderer*, the Court found that the narrow category of permissible government-mandated messages served directly and effectively the very rationale for protecting commercial speech – to ensure that consumers receive truthful information that may aid judgments about the purchase of lawful products or services. The advertising obligations imposed on Ohio attorneys were "reasonably related to the State's interest in preventing deception of consumers" and were upheld on that basis. *Zauderer*, 471 U.S. at 651.

Zauderer's analysis of mandated commercial speech, which *United Foods* noted, contains clear and direct implications for the present case. Its unambiguous recognition that chilling commercial speech might offend the First Amendment provides the clearest possible refutation of *Wileman*'s categorical dismissal of the producers' free speech claims. Moreover, *Zauderer* strongly implied a limitation on government's ability to compel commercial messages – the need for proof that the required disclosures be "reasonably related to the State's interest in preventing deception of consumers" to whom the commercial speech is directed. *Id.*

Where such an interest is absent, not only will a coerced speaker have a legitimate First Amendment objection, but the governmental interest in compelling speech is attenuated, at best. If, for example, Ohio had required attorneys to include in their advertising a statement such as "Ohio Lawyers:

They're the Best," or any other message unrelated to consumer protection, this Court's acceptance of such a mandate seems highly unlikely. Validating any government mandate for a message that is not corrective or truth-ensuring would, at the very least, fall outside *Zauderer*'s limited acceptance of a state interest that directly serves the central premise of conferring partial protection on commercial speech.

This analysis closely fits the current case, and helps to bring it squarely within *United Foods*' recognition of a producer's First Amendment objection to compelled commercial speech. The primary basis for mandating an industry-wide agricultural marketing subsidy is to benefit producers, not consumers. To the extent that consumers might benefit from greater market stability, as the *Wileman* Court suggested, 521 U.S. at 475, such an interest is far removed from the sorts of interests that underlie the commercial speech doctrine. There has been no suggestion at any stage of the current litigation that consumers need to be told that "Beef [is] what's for dinner" in order to make informed choices about the retail purchase of meats. Nor is there even a hint in the Government's defense of this program that such a mandated subsidy for a particular advertising mantra serves in any way the needs or interests of the nation's food purchasers. Thus, *Zauderer*'s limited validation of compelled attorney disclosure is of no help to the present program.

In fact, the link between the currently challenged mandate and *Zauderer*'s rationale may even be inverse. While generic messages such as those to which Respondents object may not be clearly misleading or deceptive, they surely cannot be deemed consumer-protective. Further, to the extent that a single slogan appears to consumers to reflect the unanimous view of an entire industry – when, in fact,

some producers vehemently object to that slogan because it does not accurately describe their product – the mandate may actually *deprive* consumers of potentially valuable information.

The closely analogous pork marketing program recently invalidated in *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3539 (No. 03-1180), better illustrates the problem. The mandate that dissenting producers challenged in that case compelled industry-wide support for advertising that features the slogan, "Pork. The Other White Meat." *Id.* at 162. Contrary to that message, some high-end pork producers apparently pride themselves on the pinkness of meat that comes from grain-fed animals, and find potentially misleading (as well as harmful to their interests) the suggestion that all "pork [is] . . . white meat." To be sure, such dissenters could (at substantial extra expense) buy advertisements emphasizing the special value of grain-fed pink pork products. Apart from the onerous burden of having to pay twice to spread that message to consumers, the simple fact is that a massive ad campaign implying that pork comes in only one shade is potentially misleading. Perhaps most pork, even most good quality pork, is indeed white. But as long as not all pork can be so described – and if indeed the highest quality pork is not white – the generic advertising program challenged in *Michigan Pork Producers* sends to food buyers a picture of available meat products that is less than complete, and, in that respect, potentially misleading. That result is a far cry from the basis on which the *Zauderer* Court ruled that Ohio attorneys may be required to warn potential clients of hidden costs in contingent fee arrangements. Not only is the consumer-protective rationale for compelled speech totally absent in such cases; such a government mandate may even misinform consumers.

Finally, *Wileman*'s dismissive approach to compelled, as opposed to restricted commercial speech also has been undermined. *Wileman* suggested that the checkoff did not hurt producers' First Amendment interests because they could otherwise advertise their products as they wished. But *United Foods* refused to rely on that distinction. As the court of appeals recognized in this case, "both [compelling and restricting speech] involve government interference with private speech in a commercial context." *Livestock Marketing Ass'n v. U.S. Dept. of Agriculture*, 335 F.3d 711, 722 (8th Cir. 2003). Especially for small and mid-level producers such as the Respondents, advertising budgets are not infinite. When substantial funds already have been preempted by a generic marketing program, any suggestion that dissenting producers may remain competitive while supporting their own separate advertising campaigns misapprehends market conditions in a volatile industry with relatively narrow profit margins. Whether or not such a costly burden might be justified under the unique circumstances of the fruit marketing structure in *Wileman*, no such reasoning could extend to the far less comprehensive programs involved in *United Foods* and the present case. To tell dissenting beef producers, "You may always pay separately to get your own message out" imposes an economically unrealistic dilemma. It also cannot constitutionally justify the compelled subsidy.

In *Wileman*, the ultimate ground for avoiding the clear import of commercial speech precedents seems to have been – not the absence of any prohibition or restriction – but rather "the very nature and purpose of the collective action program at issue [in *Wileman*]." 521 U.S. at 474. But in *United Foods*, the Court applied those precedents to a federal checkoff program consistently with all its earlier, pre-*Wileman* cases. Because coerced commercial speech is subject to First Amendment challenge, and because the

program now under review closely resembles that in *United Foods*, *Wileman* provides no basis for rejecting commercial speech safeguards.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals holding the federal beef checkoff program unconstitutional should be affirmed.

Respectfully submitted,

ROBERT M. O'NEIL
THE THOMAS JEFFERSON CENTER
FOR THE PROTECTION OF
FREE EXPRESSION
400 Peter Jefferson Place
Charlottesville, VA 22911
(434) 295-4784

JULIE M. CARPENTER*
DANIEL MACH
JENNER & BLOCK LLP
601 Thirteenth St., NW
Washington, DC 20005
(202) 639-6000

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*Counsel of Record

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IN THE

Supreme Court of the United States

ANN VENEMAN,
Secretary United States Department of Agriculture, *et al.*,

Petitioners,

- and -

NEBRASKA CATTLEMEN, INC., *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF STATE OF FLORIDA, DEPARTMENT OF CITRUS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

BARRY RICHARD
Counsel of Record
M. HOPE KEATING
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
(850) 222-6891

HANK B. CAMPBELL
MONTEREY CAMPBELL
GRAY ROBINSON
Post Office Box 3
Lakeland, FL 33802
(863) 284-2200

Counsel for Amicus Curiae
State of Florida, Department of Citrus

189175

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE* STATE OF FLORIDA, DEPARTMENT OF CITRUS[1]

Florida's Interest in the Case at Bar

The State of Florida, Department of Citrus ("Florida"), has a vital interest in the case at bar because the outcome has potential implications reaching far beyond the beef industry. Florida citrus is an industry that employs over 90,000 people and represents a $9 billion positive impact on Florida, making it crucial to Florida's economic welfare. As consistently recognized by this and other courts considering the question, Florida's interest in protecting and preserving the industry is paramount. Unless this case is properly analyzed pursuant to existing United States Supreme Court precedent, Florida's citrus advertising campaign, which is vitally important to the economic welfare of the State of Florida and its citrus industry, may be jeopardized.

In the matter at hand, the Court has an opportunity to clarify confusion created by lower courts that have seized upon the notion of a "collectivized" industry as that term is used by this Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997), as the sole route

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1. Pursuant to Rule 37.6 of the Supreme Court Rules, *amicus curiae* states that counsel for a party has not authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. All parties to this proceeding have provided written consent to the filing of this brief and such written consents are filed herewith.

to constitutionality.[2] The issue in *United Foods* and *Glickman* was not *collectivization* but *regulation*. Included among the courts that have misapprehended United States Supreme Court precedent in this regard, and also as to what constitutes government speech, is a Florida trial court whose decision regarding Florida's citrus advertising campaign is currently on appeal.[3]

As *amicus curiae* in this case, Florida also seeks to call to the attention of the Court that the Florida citrus industry has circumstances which are unique and different from the facts reviewed in *United Foods* and its progeny,[4] including the matter at hand. No matter what the Court's decision in this case, it is Florida's endeavor to bring to the Court's attention the need to include language in its decision protecting governmental entities such as Florida that fall squarely within the protections afforded by *United Foods* and *Glickman*.

Also, the case at bar presents an opportunity for the Court to ameliorate confusion and clarify the difference between generic agricultural assessment programs which fund speech by non-governmental or quasi-governmental industry groups

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2. *See, e.g., Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423 (5th Cir. 2004); *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004); *Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895 (9th Cir. 2003); *Summit Medical Ctr. of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350 (M.D. Ala. 2003); *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290 (E.D. Wash. 2003).

3. *State of Florida, Department of Citrus v. Graves Bros. Co.*, No. 2D03-2276 (Fla. Dist. Ct. App. 2d 2004).

4. *See* note 2, *supra*.

for the collective benefit of contributing producers, and advertising disseminated by the government itself as part of an overall regulatory scheme which advances a substantial governmental interest.

Florida's Interest in the Issue of Compelled Funding for Generic Advertising

It is in Florida's interest to take necessary measures to maintain the health of the citrus industry and to maintain a favorable atmosphere for its continued prosperity in order to protect the economic welfare of the State of Florida as a whole. This end is achieved by regulating the quality of Florida's citrus and as such, Florida has in place a complex, pervasive and expansive regulatory scheme, the purpose of which is to ensure and promote the high quality and wholesomeness of Florida citrus products.

Florida's history of regulating the citrus industry extends back to 1935 when the Florida Legislature enacted what is now Chapter 601 of the Florida Statutes, known as the Florida Citrus Code. Therein, the Department of Citrus was created to carry out the Citrus Code's provisions. The Department of Citrus is headed by the Florida Citrus Commission, which is appointed by the Governor and confirmed by the Florida Senate.

The Legislature established as part of Florida's broader regulatory scheme an excise tax under Section 601.15, Florida Statutes (2003), commonly referred to as Florida's "Box Tax." The tax is assessed against every box of citrus that enters the primary channel of trade in Florida. A portion of the revenue generated by the tax is used to fund a legislatively mandated advertising campaign, through which

information is disseminated to the consuming public regarding the quality of Florida's citrus and the lengths to which Florida goes to ensure the quality of its citrus and to ensure that the State's high standards are consistently and reliably maintained.[5]

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5. By enacting Section 601.15, Florida Statutes (2003), the Florida Legislature mandated an advertising campaign, to be conducted as follows: "The Department of Citrus shall plan and conduct campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage noncommodity advertising, to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service." § 601.15(2), Fla. Stat. (2003). The Legislature included in the statute a chart for calculating the amount of the tax. § 601.15(3), Fla. Stat. (2003). To accomplish its legislative mandate, the Department of Citrus expressly is empowered and obligated to promote the use of a "distinctive and suggestive trade name . . . to advertise Florida citrus," § 601.15(2)(b), Fla. Stat. (2003), and to disseminate information regarding Florida citrus as follows:

> 1. Citrus fruits and the importance thereof in preserving the public health, the economy thereof in the diet of the people, and the importance thereof in the nutrition of children;
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> 2. The manner, method, and means used and employed in the production and marketing of citrus fruits and information relating to laws of the state regulating and safeguarding such production and marketing;
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> 3. The added cost to the producer and dealer in producing and handling citrus fruits to meet the high standards imposed by the state that ensure a pure and wholesome product;
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> 4. The effect upon the public health which would result from a breakdown of the Florida citrus industry or any part thereof;

(Cont'd)

The advertising campaign is only one component of, though essential to, a comprehensive regulatory scheme. Indeed, the regulatory scheme touches upon every aspect of the industry, ensuring that Florida's high standard for its citrus is safeguarded, including: advertising (§ 601.15, Fla. Stat.); production, marketing and price stabilization; (§ 601.154, Fla. Stat.); boxing (§ 601.85-88, Fla. Stat.); disease control (§§ 581.181, 581.184, Fla. Stat.); dyes or coloring (§§ 601.75-77 & 601.80, Fla. Stat.); canning and concentrating (§ 601.36, Fla. Stat.); fertilizing (§ 601.92, Fla. Stat.); harvesting (§ 601.10, Fla. Stat.); grading (§ 601.45, Fla. Stat.); inspections and seizure of immature

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(Cont'd)

> 5. The reasons why producers and dealers should receive a reasonable return on their labor and investment;
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> 6. The problem of furnishing the consumer at all times with an abundant supply of fine quality citrus fruits at reasonable prices;
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> 7. Factors of instability peculiar to the citrus fruit industry, such as unbalanced production, the effect of weather, the influence of consumer purchasing power, and price relative to the cost of other items of food in the normal diet of people, all to the end that an intelligent and increasing consumer demand may be created;
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> 8. The possibilities with particular reference to increased consumption of citrus fruits; and
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> 9. Such other, further, and additional information which tends to promote increased consumption of citrus fruits and which fosters a better understanding and more efficient cooperation among producers, dealers, and the consuming public.

§ 601.15(2)(a), Fla. Stat. (2003).

or unwholesome fruit (§§ 601.27-29, 601.44, 601.54, Fla. Stat.); juicing and the use of sweeteners (§§ 601.9914 & 601.9916, Fla. Stat.); labeling (§§ 601.9905, 601.9907-9909, 601.9913, Fla. Stat.); licensing (§§ 601.55-60, Fla. Stat.); maturity standards (§§ 601.16-25, Fla. Stat.); packaging (§§ 601.40-42, Fla. Stat.); shipping (§ 601.85, Fla. Stat.); testing (§§ 601.24, 601.25, 601.43, 601.96, Fla. Stat.); and transportation (§§ 601.51-52, 601.731, Fla. Stat.).

The costs associated with the comprehensive regulatory scheme have exceeded $80 million annually, of which the generic advertising campaign expenditure is a small fraction. The regulatory scheme is designed to ensure that the quality of Florida's citrus remains at the highest level. The statutes and regulations implementing it are intended to establish Florida citrus products as the preeminent standard of quality, similar to French and California wines. The advertising campaign is ancillary to the broader regulatory scheme, and necessary for its success. It is designed to maintain strong public demand for citrus products identified with the State of Florida.

SUMMARY OF ARGUMENT

Controlling United States Supreme Court precedent establishes that compelling contributions to fund an advertising campaign is constitutional when the contribution is part of a broader regulatory scheme that is germane to a substantial governmental interest. *United Foods,* 533 U.S. at 415-417, 121 S. Ct. at 2340-41 (holding unconstitutional an advertising fee not connected with any regulatory scheme); *Glickman,* 521 U.S. at 458-59, 117 S. Ct. at 2132-33 (upholding an advertising fee that was one part of a pervasive regulatory scheme). The issue is not *collectivization* but

regulation. Even if the Court concludes that the case at bar should be affirmed, it should tailor its decision to carve out governmental entities, such as Florida, which have extensive regulatory schemes that clearly fall within the protective ambit of *United Foods* and *Glickman*.

Also, advertising funded by state taxes, such as Florida's Box Tax, is patently government speech where such advertising is disseminated by a government entity and the government entity exercises complete authority, control, and responsibility for the message conveyed, especially where the message conveyed is part of an overall regulatory scheme which advances a substantial governmental interest.

ARGUMENT

I. A Compelled Contribution to Fund a Generic Advertising Campaign is Constitutional if it is an Integral Part of a Broad Regulatory Scheme Germane to a Substantial Governmental Interest

In *Glickman*, this Court upheld an assessment imposed against growers, handlers and processors of California tree fruits under marketing orders promulgated by the Department of Agriculture. 521 U.S. at 477, 117 S. Ct. at 2142. The funds collected were used to pay for the expenses associated with administering the orders, "including specific projects undertaken to serve the economic interests of the cooperative producers," "joint research and development projects," and "generic advertising" of California nectarines, plumbs and peaches. *Id.* at 460-61, 117 S. Ct. at 2134.

In determining the constitutionality of the assessment, the Court "stress[ed] the importance of the statutory context" in which the assessment arises, as follows:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

Id. at 469, 117 S. Ct. at 2138. The Court, observing that its prior decisions "provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group," *id.* at 472-73, 117 S. Ct. at 2140, concluded that:

> Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and

> consistent with the regulatory goals of the overall statutory scheme.

Id. at 476, 117 S. Ct. at 2141.

The Court revisited the issue in *United Foods*, reviewing a First Amendment challenge to marketing orders promulgated by the Department of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act. The purpose of the Act was to maintain and expand existing markets and uses of mushrooms, and to improve Americans' eating habits and benefit the environment. 7 U.S.C. § 6101. The Act allowed the department to fund those efforts by imposing assessments on mushroom growers. 7 U.S.C. § 6104(g).

Observing that the department used the collected money almost exclusively for generic advertising, 533 U.S. at 409, 121 S. Ct. at 2337, the Court determined that the marketing orders violated First Amendment protections, distinguishing the mushroom orders there at issue from the marketing orders upheld in the earlier *Glickman* decision, as follows:

> The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

533 U.S. at 411-12, 121 S. Ct. at 2338-39. The Court in *United Foods* furthermore explained that, whereas in

Glickman the growers' "mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation," in *United Foods*, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412, 121 S. Ct. at 2339. In effect, "the principal object" of the compelled contribution is the advertising itself, and is not "germane to a purpose related to an association independent from the speech itself." *Id.* at 415, 121 S. Ct. at 2340-41.

Essentially, whereas in *Glickman* the assessments used to finance commercial speech were but a part of a more comprehensive regulatory program, in *United Foods* the advertising was the whole point of the regulation, giving rise to a First Amendment challenge. Finding that "it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place" and that no such purpose existed in the context of the mushroom marketing order, the Court determined that the assessments violated First Amendment protections. *Id.* at 413, 417, 121 S. Ct. at 2340-41.

The precedential value of *Glickman* is thus neither eliminated nor emasculated by the Court's subsequent decision in *United Foods*. Rather, the language of *United Foods* identifies a First Amendment boundary between compelled contributions for advertising under a regulatory scheme aimed exclusively at such advertising and similar contributions under more expansive regulatory programs. According to the Court, the former deserves protection, while the latter does not. In short, the Court's decision in *United Foods* therefore does not represent a significant retreat from the earlier-established deference granted to a

governmental regulatory scheme compelling commercial speech.

Both *Glickman* and *United Foods* relied upon this Court's body of First Amendment decisions most prominently set forth in *Keller v. State Bar of California,* 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), and *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), both of which required that subsidized speech be germane to a substantial state interest that justified the regulation of the industry in the first place.

In *Abood*, a teachers' union had a collective bargaining agreement which maintained a provision that the school district would be an "agency shop," so that any teacher who refused to join the union was required to pay a "service charge equal to the regular dues" paid by union members. 431 U.S. at 212, 97 S. Ct. at 1788. The Court determined that requiring the union to represent all employees did not violate the Constitution, but that spending some of the money the employees were required to contribute on political and ideological matters unrelated to collective bargaining violated First Amendment protections. *Id.* at 235-37, 97 S. Ct. 1799, 1800. Thus, while the Court found no violation with the teachers being required to pay union dues, the Court found that the fact that the dues were spent for political purposes unrelated to the union's purpose made the mandatory funding unconstitutional. *Id.*

In *Keller,* the Court clarified the *Abood* rule, explaining that it requires that activities funded from mandatory dues must be "germane" to the purpose for which the compelled association is justified. 469 U.S. at 13, 110 S. Ct. at 2236. In *Keller,* the members of the California State Bar Association

alleged that mandatory attorney's dues constituted compelled funding of speech in violation of the First Amendment because the Bar allegedly used the money it collected in dues to finance lobbying efforts in the state legislature respecting gun-control and nuclear weapons freeze causes, filing *amicus* briefs in pending cases and speaking out against political candidates. *Id.* at 5, 15-16, 110 S. Ct. at 2231, 2236-37. The Bar, of course, also examined applicants for admission, formulated rules of professional conduct, disciplined members for misconduct, and engaged in other activities to improve the administration of justice. *Id.* at 5, 110 S. Ct. at 2231. In determining the constitutionality of the compelled funding of speech, the Court explained:

> [T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, fund activities of an ideological nature which fall outside those areas of activity.
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> * * *
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> Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

Id. at 14, 110 S. Ct. at 2236.

In both *United Foods* and *Glickman*, the Court equated the "overriding associational purpose" present with the union in *Abood* and the state bar in *Keller* with the mushroom and tree fruit marketing orders. *United Foods*, 533 U.S. at 413-15, 121 S. Ct. at 2339-2341; *Glickman*, 521 U.S. at 473, 117 S. Ct. at 2140. In *Glickman*, the Court held that the tree fruit promotion program was germane to the justified associational purpose of the broader economic regulation. In *United Foods*, however, the Court observed that, unlike in *Glickman*, the mushroom marketing orders did not exist alongside other forms of economic regulation and served only to fund the advertising. The notable absence of a broader regulatory scheme in *United Foods* prompted the Court's determination that the compelled funding was unconstitutional.

The notion of "collectivization," as used by this Court in both *Glickman* and *United Foods*, merely represents a characterization of the comprehensive regulatory scheme's effect. It is *not* an essential constitutional criterion. The core of the Supreme Court's decision in *Glickman*, as restated in *United Foods*, concerned whether the mandatory assessment was ancillary to a pervasive regulatory scheme and whether the funds collected pursuant to the program there under review were used to further its purpose. In *Glickman*, of course, it happens that the subject industry was, or was authorized to be, collectivized. But the Court's consideration of that fact did not alter the constitutional analysis by adopting "collectivization" as a constitutional requirement. Any conclusion to the contrary ignores the fact that the *Glickman* decision expressly relied upon *Keller*, in which the Court had recognized the validity of California's compelled bar dues, so long as they were expended on germane purposes, despite the fact that California lawyers

certainly are not economically collectivized. The issue is not *collectivization,* but *regulation.*

Hence, compelling contributions to fund an advertising campaign is constitutional when the compelled contribution is part of a broader regulatory scheme that is germane to a substantial governmental interest. Some industries, such as Florida's citrus industry, operate under regulatory schemes which are far more comprehensive than the non-existent regulatory scheme considered in *United Foods,* or the limited regulatory schemes considered in some post-*United Foods* federal district and appellate court decisions.[6] As such, even if the Court concludes that the decision below should be affirmed, it should tailor its decision to carve out entities such as Florida, that clearly fall within the protective ambit of *United Foods* and *Glickman.*

II. The Speech Funded by Florida's Box Tax Constitutes Government Speech

In *United Foods,* this Court reserved ruling on the issue of government speech. 533 U.S. at 416-17, 121 S. Ct. at 2341. The gravamen of the government speech doctrine is that the government is free to make value judgments to convey particular messages without being subject to challenges based upon the First Amendment. *See, e.g., Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep't of*

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6. Florida's regulation of its citrus industry is also more extensive than California's regulation of its lawyers.

Motor Vehicles, 288 F.3d 610 (4th Cir. 2002); *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001), *cert. denied*, 534 U.S. 997, 122 S. Ct. 469, 151 L. Ed. 2d 384 (2001); *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S. Ct. 1168, 107 L. Ed. 2d 1070 (1990). It is well established, of course, that the "government is entitled to promote particular messages . . . [and] its policies and positions either through its own officials or through its agents." *Sons of Confederate Veterans, Inc.*, 288 F.3d at 616-17 (citing *Rust*, 500 U.S. at 194, 111 S. Ct. 1759).

In *Knights of Ku Klux Klan v. Curators of the University of Missouri*, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814, 121 S. Ct. 49, 148 L. Ed. 2d 18 (2000), the court recognized that government speech may be identified based upon the central purpose of the program, the degree of editorial control exercised by the government over the content of the message, and whether the government bears the ultimate responsibility for the content of the message. 203 F.3d at 1093-94 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)).

To the same effect is *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994, 121 S. Ct. 1653, 149 L. Ed. 2d 636 (2001), in which the court determined that when the government speaks, "its control of its own speech is not subject to the constraints of constitutional safeguards and form analysis, but instead is measured by practical considerations applicable

to any individual's choice of how to convey one's self." *Id.* at 1013.[7]

In the case at bar, the Eighth Circuit recognized that:

> The government is constitutionally entitled to engage in its own speech without implicating the First Amendment. As this Court has recognized, [t]he First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression.

Livestock Marketing Ass'n v. United States Dept. of Agriculture, 335 F.3d 711, 718 (8th Cir. 2003) (citations and internal quotations omitted), *cert. granted in part,* 124 S. Ct. 2389, 2390, 158 L. Ed. 2d 962 (2004).

In *Pelts & Skins, LLC v. Landreneau,* 365 F.3d 423 (5th Cir. 2004), despite finding that the use of fees in Louisiana for the generic marketing of alligator meat and skins violated the First Amendment, the Fifth Circuit importantly recognized that it was not reviewing advertising disseminated by a governmental entity exercising complete authority,

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7. In formulating its opinion, the Ninth Circuit in *Downs* relied upon the decisions of this Court in *National Endowment for the Arts v. Finley,* 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998), *Board of Regents of the University of Wisconsin v. Southworth,* 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), *Rosenberger,* 515 U.S. 819, 115 S. Ct. 2510, *Rust,* 500 U.S. at 173, 111 S. Ct. at 1759, and *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

control and responsibility for the message conveyed as part of a broad regulatory scheme, such as Florida's citrus advertising campaign:

> Nor are we dealing with a governmental message crafted, controlled, and expressed by an agency designed to represent state government.

365 F.3d at 432 (relying on the government speech doctrine as espoused by this Court in *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) and *Southworth,* 529 U.S. 217, 120 S. Ct. 1346).

This Court specifically recognized in *Keller* that its finding of a First Amendment violation would be different if the State Bar of California were:

> [A] "government agency," and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance. . . . The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies."

496 U.S. at 11, 110 S. Ct. at 2234. Likewise, this Court recognized that its decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed 2d 193 (2000), would be "altogether different" had the university itself been the speaker:

> The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play. When the government

> speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

529 U.S. at 235, 120 S. Ct. at 1357.

Therefore, when advertising is disseminated by a governmental entity and such advertising promotes a governmental message and the advertising is completely within such entity's control, authority, and responsibility, it should properly be characterized as government speech.

The Florida Legislature expressly established the Department of Citrus as an agency of the State and mandated that the Department of Citrus shall speak for the State on citrus related matters.[8] The Florida Legislature also mandated an advertising campaign to be conducted by the Department of Citrus as follows: "The Department of Citrus shall plan

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8. The Legislature sets out the organizational structure for the executive branch of Florida's government in Chapter 20 of the Florida Statutes, and creates therein State agencies under the powers granted by Article IV, Section 6, of the Florida Constitution. § 20.02(2), Fla. Stat. (2003). The Department is specifically created as a State agency by Section 20.29, Florida Statutes (2003). The Department submits its budget annually to the Legislature for approval, is audited by the State, and its operations are governed by statute and overseen by the executive branch of Florida government and the Legislature. *See* §§ 20.051, 20.055 and ch. 601, Fla. Stat. (2003). The Department's employees all are: (i) employees of the State of Florida; (ii) paid by the State through the Chief Financial Officer; (iii) part of the State pension fund; and (iv) protected by sovereign immunity. *See* § 601.10, Fla. Stat. (2003).

and conduct campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage noncommodity advertising, to increase consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service." § 601.15(2), Fla. Stat. In addition, the Florida Supreme Court has specifically approved the Legislature's delegation of authority to the Department of Citrus to advertise and promote Florida citrus. *Coca-Cola Co. v. State Dept. of Citrus,* 406 So. 2d 1079, 1084 (Fla. 1981).

The promotion of Florida citrus, which is supported by funds collected under the Box Tax, has been legislatively and judicially determined to be crucial to the general economic welfare of the State of Florida. The Florida Supreme Court's decision in *Coca-Cola* affirmed a lower court decision which relied on this Court's consideration of the Citrus Code in *Sligh v. Kirkwood*, 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915):

> The regulation of the Florida citrus industry in the exercise of the state's police power has been upheld many times. *E.g., Sligh v. Kirkwood,* 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed 835 (1915); *L. Maxcy, Inc. v. Mayo,* 103 Fla. 552, 139 So. 121 (1932); *Mayo v. Polk Co., supra.* In *Sligh v. Kirkwood* . . . the United States Supreme Court observed that the police power, in its broadest sense, includes all legislation and almost every function of civil government. Most significantly, the court said "[the police power] embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health."

In that case the Court had under consideration a Florida statute making it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which were immature or otherwise unfit for consumption. The opponents of the statute contended that it was not a legitimate exercise of the police power because it had the effect of protecting the health of people in other states who might receive fruits from Florida in a condition unfit for consumption and, however commendable it may be to protect the health of such foreign peoples, that purpose is not within a state's police power. In upholding the statute, the Court said, in effect, that economic benefits are a legitimate purpose for the exercise of a state's police power:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in

> foreign markets, with the consequent beneficial effects upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.

Florida Canners Ass'n v. State Dept. of Citrus, 371 So. 2d 503, 514 (Fla. 2d DCA 1979) (citing *Sligh*, 239 U.S. at 61, 35 S. Ct. at 503, 59 L. Ed. at 839), *aff'd*, 406 So. 2d 1079 (Fla. 1981). In addressing whether advertising constituted a valid objective for the exercise of police power, the court in *Florida Canners* further recognized that:

> The Florida Supreme Court had an early opportunity to consider the value to the Florida citrus industry of advertising Florida citrus fruit. *C.V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248 (1937). In that case the excise taxes levied by the three 1935 legislative enactments establishing the orange, grapefruit, and tangerine advertising funds were attacked on the ground that the tax was not a public purpose. The court held that it was, saying "it cannot be reasonably contended that the protection and promotion of the citrus industry in Florida is not a matter of public concern or that the legislature may not determine within reasonable bounds what is necessary for the protection and expedient for the promotion of that industry. We are committed to the theory that advertising is a proper method for promoting the

> public welfare and that, therefore, the tax levied to provide funds for advertising serves a public end."

Id. at 515.

The *United Foods* and *Glickman* requirement of a comprehensive regulatory scheme for agricultural commodity advertising campaigns has its roots in the substantial governmental interest in the agricultural industry sought to be regulated and advanced. Such a substantial governmental interest is never more clearly evidenced than by the government's valid exercise of its police powers to support, protect and advance such an industry for the welfare of the government. As shown in the cases cited above, Florida's substantial governmental interest in the Florida citrus industry has long been held to be a proper subject of the exercise of the Florida's police power. *See Coca-Cola and Florida Canners Ass'n, supra.* More especially, Florida's regulation of that industry for the purpose of advancing the economic well-being of the industry, and thereby of Florida, has been approved as being within the proper exercise of Florida's police power. *Id.*

As previously noted, Florida's advertising is only one part of the overall regulatory scheme in Florida which includes the Citrus Code, as well as its related statutes, rules and regulations, designed to insure the agricultural health of the citrus grower and the industry; assure that the consumers of fresh and processed citrus products receive high quality, safe, and health products; and assure that the regulation and promotion of those citrus products works to the economic advantage of the State of Florida as a direct result of the advancement of the economic health of its citrus industry.

Florida's advertising of Florida citrus is part of an overall regulatory scheme which advances a substantial state interest. Such advertising is completely within Florida's control, authority and responsibility. The advertising contains none of the limitations on government speech as set forth in federal case law. Therefore, in any decision or statement the Court makes in the instant case regarding government speech, the Court is respectfully urged to include language that clearly distinguishes the difference between generic agricultural assessment programs which fund speech by non-government or quasi-government industry groups for the collective benefit of contributing producers and advertising disseminated by the government itself as part of an overall regulatory scheme which advances a substantial governmental interest.

CONCLUSION

The court has an opportunity in this case to correct mischaracterizations of its decisions in *United Foods* and *Glickman*. Also, the Florida citrus industry has circumstances which are unique and different from the facts reviewed in *United Foods* and the post-*United Foods* cases. Thus, no matter what the Court's decision in this case, the Court is respectfully urged to include language in its decision protecting entities such as Florida that fall squarely within the protections afforded by *United Foods* and *Glickman*. The Court is also respectfully urged to include language in its decision to clarify that advertising disseminated by a government agency is government speech where the government agency exercises complete authority, control, and responsibility for the message conveyed and where the message conveyed is part of an overall regulatory scheme which advances a substantial governmental interest.

BARRY RICHARD
Counsel of Record
M. HOPE KEATING
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
(850) 222-6891

HANK B. CAMPBELL
MONTEREY CAMPBELL
GRAY ROBINSON
Post Office Box 3
Lakeland, FL 33802
(863) 284-2200

Counsel for Amicus Curiae
State of Florida, Department of Citrus

(9) (6)

Nos. 03-1164 and 03-1165

In The
Supreme Court of the United States

AUG 17 2004

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, et al.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, et al.,

Respondents.

NEBRASKA CATTLEMEN, INC., et al.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF MICHIGAN PORK PRODUCERS ASSOCIATION, INC., ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

EDWARD M. MANSFIELD
Counsel of Record
BELIN LAMSON MCCORMICK ZUMBACH FLYNN, P.C.
666 Walnut Street,
2000 Financial Center
Des Moines, IA 50309-3989
Telephone: (515) 243-7100

ROBERT C. TIMMONS
418 College Avenue NE
Grand Rapids, MI 49503-1706
Telephone: (616) 291-4288

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

These *amici* are six state pork producer associations[2] and three hog farmers.[3] *Amici* are the petitioners in No. 03-1043, which is being held in abeyance by the Court pending the decision in this case. Each of the six *amici* state associations is governed through an open, democratic process and has been "recognized by the chief officer of such State as representing such State's [pork] producers." 7 C.F.R. § 1230.25.

In their pending petition, *amici* have asked this Court to review and reverse a decision of the United States Court of Appeals for the Sixth Circuit invalidating on First Amendment grounds a $50 million federal agricultural program – the Pork Promotion, Research and Consumer Information Act of 1985 ("Pork Act"). *See* 7 U.S.C. § 4801, *et seq.*; *Michigan Pork Producers Assn., Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003). The Pork Act imposes a $.40 per $100 value nationwide assessment on sales of swine or their slaughter for sale. This assessment is analogous to a .4% tax (and is characterized as a "Pork Tax" by its opponents). As specifically directed by Congress in 1985, the "Pork Tax" funds (in part) generic advertising to encourage Americans to eat more pork. The text of each and every

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative Inc., and Ohio Pork Producers Council.

[3] High Lean Pork, Inc., Pete Blauwiekel and Bob Bloomer.

advertisement is reviewed, edited where appropriate, and specifically approved in advance by full-time employees of the U.S. Department of Agriculture.

By all objective standards, the Pork Act has been enormously successful. According to a recent, independent, peer-reviewed economic study that was mandated by Congress and took three person-years to complete, the Pork Act delivers at least $4.79 in returns to pork producers for each $1 in assessments. The demand enhancement activities (such as generic advertising) are particularly effective, and provide even higher positive returns of $15.26 to each $1 invested. Conservatively, the Pork Act results in a net price increase of $1.17 per hog sold in the United States. These are across-the-board benefits to *all* pork producers, large and small. *Amici* doubt that many federal programs could pass such a rigorous cost-benefit test.

This case concerns the constitutionality of a similar but not identical program – the Beef Promotion and Research Act of 1985 ("Beef Act"). *Amici* are concerned that a decision by this Court striking down the Beef Act also have the effect of invalidating the Pork Act. The loss of this highly successful and irreplaceable federal program would have serious adverse consequences for the nation's 80,000 plus pork producers.

SUMMARY OF ARGUMENT

This case is about an asserted constitutional right that does not exist – a claimed right to prevent the federal government from telling the public about the merits of eating beef. In fact, there is no constitutional right to keep

the government from speaking. A pacifist may object to an ad for the U.S. Army; a libertarian to an anti-drug message; and a tobacco farmer to a speech by the Surgeon General. But none have the right to enjoin the government from speaking because their taxes or other exactions are being used for those forms of speech. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990).

Of course, this is stating the obvious. But it now becomes necessary to *re*state the obvious, because federal courts of appeals around the country are invalidating federal agricultural programs on First Amendment grounds without considering the undisputed fact that these programs deliver promotional messages endorsed by Congress under the direct supervision of the U.S. Department of Agriculture. Since the government is speaking in each of these programs, their fate should properly be determined by the political process. A few objectors should not be able to shortcut that process by filing a lawsuit – thereby denying everyone in that particular industry the economic benefits that Congress and the executive branch intended to provide.

Unfortunately, in this case, the Eighth Circuit[4] wrote government speech out of the case. It improperly conflated government speech with *Central Hudson*[5] analysis, then it

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[4] *Livestock Marketing Assn. v. U.S. Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003).

[5] *Central Hudson Gas and Elect. Corp. v. Public Serv. Comm. of NY*, 447 U.S. 557 (1980).

collapsed *Central Hudson* analysis into the germaneness inquiry set forth in *United States v. United Foods*, 533 U.S. 405 (2001). This meant that the entire decision was controlled by *United Foods* – without that court giving separate consideration to government speech or *Central Hudson* as grounds for sustaining the program. In other words, the Eighth Circuit effectively decided that *United Foods* foreclosed reliance on the government speech doctrine, even though this Court had expressly declined to reach the government speech doctrine in *United Foods*. *See* 533 U.S. at 417. This Court, *amici* respectfully suggest, needs to do better.

Consistent with its own precedents, this Court should hold that agricultural commodity programs constitute "government speech" whenever they deliver a legislatively endorsed message under the active and direct editorial control of a government agency – especially where the government literally *owns* that speech. 7 C.F.R. § 1260.215. At the same time, this Court should reject efforts to draw artificial and unrealistic lines based on whether the program benefits "public" or "private" interests, whether it is supported by general revenues or an "assessment," or whether the literal speaker or original author of the message is a regular employee of the government. Those distinctions are not warranted by this Court's precedents and do not go to the essence of whether the government is speaking. Most importantly, they could lead to the invalidation of many other valuable government programs and hamstring the government's ability to deliver information-based services.

ARGUMENT

I. This Court's Prior Decisions Have, With Some Degree of Clarity, Marked a Sensible Dividing Line Between Private Speech and Government Speech.

If one thinks about it, "government speech" ought to be fairly simple. The critical consideration should be whether a government message is being delivered under the actual control of the government. Whether the speech happens to benefit one sector of the economy should be unimportant, because the vast majority of government programs (and certainly all agricultural programs) have targeted benefits. Similarly, whether the speech is funded by general tax revenues or not should be of little importance, because governments raise money in many different ways. Likewise, whether the initial author or the ultimate speaker of the message works full-time for the government should be irrelevant, because the government routinely uses private contractors to perform these kinds of services.

To date, this Court's decisions have generally adhered to this line of reasoning. Thus, this Court has found that **private speech** includes:

- Ideological activities of the Detroit Federation of Teachers that are unrelated to collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977).
- Statements made by the State Bar of California lobbying for or against state legislation on polygraph testing, possession of armor-piercing ammunition, rights to sue, etc. *Keller*, 496 U.S. at 15-16.

- Statements made by 343 different student organizations at the University of Virginia, which had contractually agreed they are neither part of nor controlled by the University. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 823-25 (1995).

- Statements made by student organizations at the University of Wisconsin such as Future Financial Gurus of America, the International Socialist Organization, the College Democrats, the College Republicans, and the American Civil Liberties Union Campus Chapter. *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 223 (2000).

- Statements made by Legal Services attorneys representing welfare claimants. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 538-39 (2001).

At the same time, though, this Court has found that **government speech** includes:

- Invocations delivered by students (where the students chose the texts of the invocations) pursuant to school district policy before high school football games. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-09 (2000).

- Statements made by physicians on family planning topics carrying out a federal program to support preventive family planning. *Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991).

The Beef Act falls on the government speech side of this dichotomy. It is not like *Rosenberger* or *Southworth* – where the government decided to let a hundred flowers bloom, and then refused to water one of them. Nor does this case involve speech by an outside actor intending to

influence the government, as in *Abood*, *Keller*, or *Velazquez*. (Indeed, it is strictly forbidden for Beef Checkoff funds to be used to influence legislation or governmental policy. 7 U.S.C. § 2904(10); 7 C.F.R. § 1260.169(e).)

Rather, since 1985, the government through its elected representatives has chosen to convey the message to the public that beef "is a valuable part of human diet," 7 U.S.C. § 2901(a)(1), just as it has chosen to fund countless advertisements that drugs and smoking are harmful to health. The generic ads run by the Beef Board and qualified state beef councils, under the editorial scrutiny of USDA, are delivering a government message to eat beef. 7 U.S.C. § 2901(b). It was Congress – not some unelected private entity – that decided in deliver this message. "The simplest and clearest example of government speech advancing a point of view is provided when a 'law' specifically adopts a program of promoting a specific message." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 *Iowa L. Rev.* 1377, 1384 (2001). That is exactly what happened here in 1985.

Furthermore, it bears particular emphasis here that, unlike in *Rust*, a federal cabinet department has not merely decided on a general message and left it to others to deliver, but that department actually reviews in advance and (where necessary) disapproves advertisements. *If these ads involved private speech, one might ask, why is USDA telling the Beef Board and state beef councils what to say? Would that not be a flagrant First Amendment violation?* Indeed, prior restraints, such as USDA performs on Beef Act-funded advertisements and producer communications, raise the most serious First Amendment concerns and – as a practical matter – are almost never sustained against constitutional attack. *See New York*

Times Co. v. United States, 403 U.S. 713 (1971) (the Pentagon Papers case). Yet prior, content-based restraints are the norm with respect to Beef Act-funded speech, demonstrating that this is government, not private, speech.

Moreover, the Beef Act is subject to "traditional political controls." *Southworth*, 529 U.S. at 229. It could be terminated through the normal legislative process (and indeed its opponents have lobbied unsuccessfully for its termination).[6] In short, the government has more control over the message being disseminated than it had in *Rust* and *Santa Fe*. Since those cases were found to involve government speech, this case clearly does.

II. A Number of Lower Courts Have Been Ignoring that Dividing Line and Instead Relying Upon Irrelevant Factors.

Aside from the Eighth Circuit, which really declined to give separate consideration to the government speech doctrine, lower courts that have refused to hold that agricultural commodity programs involve government speech generally have cited three factors in their opinions:

- The primary purpose of these programs is to benefit a specific industry. *Michigan Pork Producers Assn.*, 348 F.3d at 161; *Cochran v. Veneman*, 359 F.3d 263, 274 (3rd Cir. 2004); *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 432 (5th Cir. 2004).

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[6] Additionally, many of the federal commodity promotion programs – although not the beef program – can be terminated by the Secretary of Agriculture at his or her discretion. This subjects the program to an additional political control. *See* 7 U.S.C. § 4812(a) (giving the Secretary of Agriculture discretion to terminate the pork program).

- The funding for these programs does not come from general tax revenues, but from assessments on the beneficiaries of those programs. *MPPA*, 348 F.3d at 162; *Pelts & Skins*, 365 F.3d at 430, 432.

- The government itself does not generally propose or draft the advertisements. *MPPA*, 348 F.3d at 162; *Pelts & Skins*, 365 F.3d at 432.

Yet there is no reason why these factors should be determinative. The plain facts are:

1. Virtually all government programs are targeted to particular groups or industries.

2. Governments are creative at raising money and levying various taxes, assessments and user fees all the time. In tight budgetary times, these kinds of exactions tend to proliferate, as elected representatives take the view that those who directly benefit from a government program ought to pay for it.

3. Much of what the government says is not the original work product of its own employees.

Hence, a government speech test based on these three factors would inevitably call all sorts of federal programs into question.

To begin with, most federal programs – not just the Beef Act – are designed to benefit a particular group. That is often Congress's intent, *i.e.*, to help one sector of our economy, in the belief that this makes America stronger and better as a whole. Congress demonstrated this intent when it enacted the Pork Act: "Congress finds that . . . the production of beef and beef products plays a significant role in the Nation's economy of the United States. . . . [T]he maintenance and expansion of existing markets for

beef and beef products are vital to . . . the general economy of the Nation . . . ." 7 U.S.C. § 2901(a). Congressional intent to benefit a specific industry is not a reason for striking down a federal program.

Furthermore, most of us cannot write like Ralph Ellison, Edith Wharton, or F. Scott Fitzgerald. Federal employees are no exception. Like the rest of us, therefore, they frequently borrow from, ratify, approve, or adopt the speech of others. However, it does not make speech any less the government's because the government asked people with greater ability and expertise to craft the government's message.

Just as the government routinely contracts for outside services in other areas, in this case the Department of Agriculture has partnered with experts, subject to various controls over the final product. If carried to its logical conclusion, the position of those lower courts could bar the government from obtaining private assistance in any communications-related area. To put it another way, no one would suggest that under the First Amendment, a pamphleteer is entitled to less protection because he or she did not "create" the pamphlet. By the same token, however, the government must be permitted to speak through speech "created" by others as well. Indeed, that is one teaching of *Rust*.[7]

Lastly, much of what our government does is not funded by general revenues. The government levies all

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[7] The Army did not invent "Be All You Can Be" or "An Army of One"; each of these slogans was developed by a private ad agency. Furthermore, the actors who deliver the voiceovers in Army recruiting ads typically are not federal employees.

kinds of narrowly focused taxes, user fees, and assessments – on vehicles, gasoline, airline tickets, etc. This has nothing to do, logically or legally, with whether the speech funded by that exaction is that of the government. It would be absurd to say that an airline passenger has a First Amendment right to enjoin an airport authority from displaying an anti-terrorism message in an airport terminal, just because that message was funded by security fees imposed on that passenger rather than general tax revenues.

Moreover, the suggestion that government speech has to be financed from general tax revenues flies directly in the face of both *Rosenberger* and *Southworth*. In *Rosenberger*, the funding mechanism was "a mandatory fee of $14 per semester assessed to each full-time student." 515 U.S. at 824. Yet, when this Court indicated that the University of Virginia could "disburse[] public funds to private entities to convey a governmental message," *id.* at 833, it was taking for granted that this $14 per student per semester assessment amounted to "public funds." The constitutional problem did not arise from the fee, but from what the university was doing with it. Specifically, the university was utilizing the fee "to encourage a diversity of views from private speakers" while also imposing a content-based restriction. *Id.* at 834.

Similarly, in *Southworth*, 529 U.S. at 229, this Court said, "The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties" (emphasis added). This Court added, "If the challenged speech here were *financed by tuition dollars* and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.*

(emphasis added). Thus, according to *Southworth*, government speech may be financed by "other exactions," not just by general revenues.

By any reasonable standard, the Beef Act assessment – which is analogous to a flat per-head tax and is paid by corporations, partnerships and individuals alike – is less targeted than the fees that were involved in *Rosenberger* and *Southworth*.

III. Failure to Reaffirm That Dividing Line Here Could Jeopardize Many Valuable Government Programs.

This is not just a case about agricultural commodity programs. Failure to recognize the proper boundaries of the government speech doctrine here could have far-reaching reverberations.

For example, under the Food, Drug & Cosmetic Act, drug manufacturers seeking approval of a new drug must file an application and pay a user fee. 21 U.S.C. §§ 355, 379h. That fee covers the costs of the Food & Drug Agency's review process. FDA then assigns an advisory panel (comprised exclusively of private individuals) to review and report back on the drug. *Id.* § 355(n). Under the rationale of recent agricultural commodity decisions, one could easily argue that system violates the First Amendment. It is an "abridgment" of drug manufacturers' First Amendment rights because they have to pay for speech by advisory panel members with which they may disagree.

California has a $.25 per pack surtax on cigarette sales to fund various programs, including anti-tobacco advertising. In other words, California uses taxes paid by a specific

industry to fund advertising that condemns that industry. Is this government speech? If it is unconstitutional to impose an assessment on an industry to fund speech benefiting it, then logically the same must be true of an assessment to pay for speech attacking that industry. The federal district court in California upheld the surtax based on the government speech doctrine. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1104 (E.D. Cal. 2003).

Many governments use special taxes or assessments (such as on hotel rooms or rental cars) to promote tourism. For example, Hawaii has a Tourism Authority (a public agency, although its members are not state employees). The Tourism Authority receives most of its funding from a transient accommodations tax, then transfers much of that funding to a private entity known as the Hawaii Convention and Visitors Bureau. The HCVB recently has come under criticism for its spending and management practices. *See* Honolulu Advertiser, January 10, 2004. Under the reasoning of the lower courts discussed above, it would seem relatively easy for someone to shut down the HCVB by bringing a First Amendment claim, arguing that he or she had to pay the accommodations tax, thinks Hawaii's beaches are getting too crowded, and objects to paying for advertising that touts Hawaii's sunshine and temperate climate. Or, objection could be raised to some other aspect of HCVB's advertising, such as a controversial recent joint promotion with Disney.

IV. This Court Should Not Downplay the Importance of Federal Promotional Legislation Such as the Beef Act and the Pork Act.

Finally, this Court should not underestimate the dollars-and-cents importance of federal agricultural commodity programs. The hard economic evidence shows

the benefits of generic advertising to all producers, large and small. It is undisputed that generic advertising works for everyone in the industry by increasing consumer demand and thus the overall price level – and that branded advertising would not be an adequate substitute. In the Pork Act litigation, the Act's opponents tried to develop their own economic evidence, hiring an agricultural economist from the University of Wisconsin, but they gave up when their economist testified that the congressionally-mandated study was a "pretty good study." Slogans like "Beef, It's What's for Dinner" and "Pork: The Other White Meat" may seem to be more flash than substance, but the fact is that they have put millions of dollars into the hands of the nation's livestock producers by getting the nation's consumers to eat more beef and pork.[8]

And that is what Congress intended. For example, the official House Report to the Food Security Act of 1985 (which included both the Beef Act and the Pork Act) states as follows regarding the purposes behind the Pork Act:

> Because today's pork products are leaner than before, American consumers need to know that pork and pork products should play a significant role in their diets, and pork is an excellent food value from an economic and health standpoint. That is the role that pork promotion has to play – to inform the consuming public that pork not only tastes good, but is a positive nutritional

[8] Lacking hard economic evidence, opponents of these programs consistently rely upon the *post hoc propter hoc* fallacy – *i.e.*, because people are leaving farming, these programs must not be working. The congressionally-mandated independent study of the pork industry concluded that the Pork Act had actually ameliorated the decline in numbers of hog farmers.

> component in a healthy, balanced diet. Promotion, research and consumer information will assist to enhance the acceptability of pork products while minimizing their cost and thus the pork sector of agriculture viable vis-à-vis its competitors.

H.Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1294 (1985).

It would be ironic if these successful programs vanished simply because Congress tried to make them *too fair* – that is, to impose their costs through a broad-based assessment on the people and entities who benefit from them – and *too effective* – that is, to utilize at minimal cost the expertise of those who work in the industries, while making every word ultimately subject to the editorial control of full-time federal employees.

CONCLUSION

This Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit and uphold the constitutionality of the Beef Act.

Respectfully submitted,

BELIN LAMSON MCCORMICK
ZUMBACH FLYNN, A PROFESSIONAL CORPORATION

EDWARD M. MANSFIELD
Counsel of Record
666 Walnut Street,
2000 Financial Center
Des Moines, IA 50309-3989
Telephone: (515) 243-7100

ROBERT C. TIMMONS
418 College Avenue NE
Grand Rapids, MI 49503-1706
Telephone: (616) 291-4288

Attorneys for Amici Curiae

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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

October 2004

Attorney for Amicus Curiae

QUESTION PRESENTED

Whether a beef advertising program that all beef producers are compelled by the government to support can be saved from First Amendment invalidation under *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), on the theory that it is "government speech" or "commercial speech."

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues, and one of its principal concerns is consumer protection. Public Citizen has a particular interest in the commercial speech doctrine both because protecting truthful commercial speech helps consumers make informed choices in the marketplace and because preventing false and misleading commercial messages is critical to protecting consumers. Public Citizen attorneys have represented parties in a number of this Court's commercial speech cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993). Public Citizen has also filed amicus briefs in other commercial speech cases before this Court, including, most recently, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

Another of Public Citizen's major interests is public health, including the safety of the food supply and the impact of dietary choices on health. The generic and undifferentiated promotion of beef to consumers through the checkoff program of the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.*, significantly affects this interest. Public Citizen is particularly troubled by the prospect that such advertising, which is in the private interest of an industry rather than of consumers or the public at large, may be characterized misleadingly as "government speech." Accordingly, Public Citizen submits this brief in support of the respondents.

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[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

STATEMENT

The way beef is produced has a major impact on the health of the nation. For example, widespread practices in the mainstream beef industry (especially in the feedlot system and in the slaughtering and packing of beef by large-scale processors) help perpetuate pervasive food safety problems, including salmonella and e. coli contamination that has killed some American consumers and sickened thousands of others.[2] The beef industry has also promoted beef irradiation (which it misleadingly refers to as "cold pasteurization") as a short-cut solution to these contamination issues, despite the continuing scientific uncertainty over whether irradiation itself is safe.[3] In addition, the industry has, in our view, reacted inadequately to concerns about bovine spongiform encephalopathy ("Mad Cow Disease").[4]

Generic promotion of beef consumption encourages consumers to ignore these health issues and threatens to overwhelm the government's own message about diet and health, which is that Americans should eat more grains, fruits, and vegetables, and fewer and smaller servings of meat. Generic beef advertising also tends to obscure critical differences within the industry: On the one hand, there are mainstream producers whose cattle receive large quantities of hormones and antibiotics, are fattened in crowded and unsanitary feedlots, and are slaughtered and processed in industrial plants that contribute to the spread of contaminants; on the other, there are producers who grow organic, free-range or grass-fed beef and keep their products out of the big feedlots and

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[2] *See generally* Felicia Nestor & Patty Lovera, *Hamburger Hell: The Flip Side of USDA's Salmonella Testing Program* (2002), available at www.citizen.org/documents/salmonellareport.PDF.

[3] *See* Public Citizen, *The Top Ten Problems With Irradiated Food* (2004), www.citizen.org/documents/Top10.pdf.

[4] *See* Public Citizen, *Mad Cow Disease an Accident Waiting to Happen* (2004), www.citizen.org/pressroom/release.cfm?ID=1629.

slaughterhouses.[5] But to listen to the generic advertising program, "what's for dinner" is just plain "beef."

Public Citizen does not expect the Court to take sides in the controversies over beef production or the divisions within the beef industry itself. But we believe that in thinking about the issues posed by this case, it is critically important to distinguish between speech in which the dominant segment of an *industry* tries to sell consumers a *product* that it may or may not be in their interest to buy and speech that genuinely reflects the government's position on issues of public concern. Whether or not it limits the way the government chooses to fund the latter, the First Amendment must apply with full force when funding for an industry's advertising is coerced from a narrowly targeted group that includes opponents of the industry's marketing message.

SUMMARY OF ARGUMENT

In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court addressed the question "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *Id.* at 410. The Court said the answer was no, at least when the speech in question amounted to no more than what Justice Stevens called the "naked imposition of ... compulsion" to support speech that is "nothing more than commercial advertising." *Id.* at 418 (Stevens, J., concurring).

The beef promotion program at issue in this case was found by the court below to be essentially indistinguishable from the mushroom promotion program in *United Foods*, and so the court followed *United Foods* in holding that compelling dissenting beef producers to support it violated the First

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[5] *See* Jim Robbins, *Balancing Cattle, Land and Ledgers*, N.Y. Times, October 8, 2003; *see also* Eric Schlosser, *Fast Food Nation* 201-04, 255-57 (Perennial ed. 2002).

Amendment. The federal government, however, argues that the holding of *United Foods* does not apply here for two reasons supposedly not considered by the Court in that case: First, the government says the beef advertising funded by the program is "government speech," and, according to the government, compelled support for government speech is completely immune from First Amendment scrutiny. Second, the government contends that the beef ads are merely "commercial speech," and that the interest in not supporting such speech is subject to less constitutional protection.

To begin with the government's second argument, it is not correct to say that this Court did not address the commercial speech issue in *United Foods*. Rather, the Court made clear that "even viewing commercial speech as entitled to lesser protection, we find no basis ... to sustain the compelled assessments sought in this case." 533 U.S. at 410. In any event, this Court's commercial speech precedents do not suggest that the government can compel support for commercial messages from those who disagree with them just to relieve an industry of so-called "free rider" problems.

Thus, the government's attempt to get around *United Foods* rests principally on its government speech argument. It is true that the Court did not address the government speech argument that it understood the Solicitor General to be making in *United Foods*. *See* 533 U.S. at 417. But the extremely broad arguments made by the government here are antithetical to the Court's holding in *United Foods* that the government may not "underwrite and sponsor" advertising with funds exacted from objecting members of a particular industry. *Id.* at 410. On the government's view, *any* speech the government "underwrites" or "sponsors" is government speech immune from First Amendment challenge. In short, the government's position completely negates *United Foods*.

Moreover, the government's simplistic assertion that speech is categorically immune from First Amendment scrutiny whenever its message is specified by the government, or

when an entity that is nominally governmental is involved in disseminating it, cannot be squared with this Court's opinions. Most notably, *Keller v. State Bar of California*, 496 U.S. 1 (1990), one of the Court's few opinions to address a government speech issue directly, holds that the formal categorization of a speaker as a government body is not dispositive of the First Amendment analysis.

The government's contrary argument posits that the handful of cases in which this Court has referred to government speech have erected a rigid doctrine based on a black-and-white dichotomy between governmental and non-governmental speech. That is not so, and should not become so. Instead, the Court should recognize that the matter is more complex and requires a more nuanced and realistic review of the nature of the speech and the speakers at issue.

Here, such an analysis must take into account that the speech is devised by industry members to promote their private interests in selling their products to consumers. The supposedly "governmental" body that oversees the program is entirely composed of members of the affected industry, and the advertising is actually created and disseminated by closely allied private organizations representing the dominant voices within the industry. The messages that the program conveys are not presented to the public as emanating from the government, but as advertising sponsored by "America's Beef Producers." And the content of the advertisements is not only exclusively designed to promote the industry's interests and persuade consumers to buy its products, it is also in tension with the government's own messages to consumers about healthy dietary choices.

All these features show that the beef promotional advertising is not the sort of government speech that might arguably be excused from condemnation under the principles of *United Foods*. Whatever may be the case with respect to other messages that genuinely constitute the government's

own speech, the industry advertising program here should not be exempted from First Amendment scrutiny.

ARGUMENT

I. THE COMMERCIAL SPEECH DOCTRINE DOES NOT SAVE THE BEEF PROGRAM.

Despite this Court's statement in *United Foods* that viewing generic promotional advertising as "commercial speech" would make no difference to the constitutionality of the mushroom program, 533 U.S. at 410, the government, without arguing that the beef program is distinguishable from the mushroom program, argues that the beef program can be sustained under a commercial speech analysis. Even if *United Foods*'s rejection of that very argument is set aside, this Court's commercial speech precedents offer scant support for the government's position.

To be sure, the Court has held that when a person has chosen to engage in commercial speech by advertising a product or service, his "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 650 (1985). Thus, governments may impose disclosure obligations on advertisers that are "reasonably related" to the "interest in preventing deception of consumers." *Id.* Similarly, the government may require persons who choose to advertise their products to include health and safety warnings that the government deems necessary to prevent or mitigate harm to consumers that may result if they heed the advertiser's commercial message. *See Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 54 (1st Cir. 2000), *aff'd in part and rev'd in part on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

The Court made clear in *United Foods*, however, that promotional campaigns like the beef checkoff advertising program are by no means "necessary to make voluntary advertisements nonmisleading for consumers." 533 U.S. at 416.

And, as the Court recognized in *United Foods*, saying that a person who advertises has a minimal interest in not including warnings or disclaimers necessary to protect consumers is not the same as saying that he has a minimal interest in not joining in an advertising campaign at all. On the contrary, as Justice Stevens pointed out, a person may have a strong commercial interest in not "financ[ing] advertising for the benefit of his competitors." 533 U.S. at 418 (Stevens, J., concurring). In addition, there may be powerful ideological, moral, or religious reasons for not wanting to advertise a product or join in a particular promotional message about that product.

An example illustrates the point. Suppose that in *Wooley v. Maynard*, 430 U.S. 705 (1977), the state had been Michigan instead of New Hampshire, and it had placed on its license plates the slogan, "What's good for GM is good for the country." Would the First Amendment interest of an objecting citizen (or a GM competitor forced to bear the slogan on its own corporate fleet) have been deemed insubstantial because the message was commercial? It seems doubtful, to say the least. As the Court recognized in *United Foods*, objections to commercial messages, like objections to political ones, involve "freedom of belief." 533 U.S. at 413.

In this case, dissident beef producers may have principled objections to joining in advertising that tells consumers that they should consume beef without troubling themselves much (or at all) about differences in the way cattle are raised, fed, medicated, slaughtered, and processed. These objectors may, for example, dissent from the beef checkoff program's message that consumers should not worry about the overuse of antibiotics in cattle or about cattle feeds that contain animal byproducts, or they may disagree that conventional beef production is humane.[6] Producers who raise grass-fed, free-

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[6] The messages conveyed by the checkoff program on these subjects are found at www.beefitswhatsfordinner.com/askexpert/inthenews.asp, which tells consumers, among other things, that cattle producers use

(*Footnote continued*)

range, or organic beef or whose beef does not go through large industrial slaughterhouses and processing plants may also have powerful commercial interests in not sponsoring messages that suggest that conventional beef is just as good as, or even superior to, their products. A producer of grass-fed beef, for instance, might understandably object to having to support the checkoff program's message that grain-fed beef tastes better and is more tender than grass-fed beef.[7]

The government's commercial speech analysis not only devalues the strong interest of objectors in not supporting the beef promotional program, but also places unwarranted weight on what is virtually the sole interest advanced by the government to justify the program: avoiding "free riders." The free-rider argument would be available in virtually any generic advertising program, and, indeed, was offered in *United Foods* as well. *See* 533 U.S. at 429 (Breyer, J., dissenting). *United Foods*'s conclusion that such rationales do not suffice to sustain a program in which advertising is not a part of some broader regulatory program, *see* 533 U.S. at 412-16, cannot be wished away merely by invoking the commercial speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

The *Central Hudson* test requires the Court to consider purported justifications for speech regulations skeptically, demanding that the government "demonstrate that the harms

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"safe, FDA approved antibiotics only when needed for the health of the cattle," that producers "follow animal care and welfare guidelines developed by veterinarians and animal behaviorists to ensure animals are raised humanely," and that organic beef is not safer from Mad Cow Disease than conventionally fed beef.

[7] *See* www.beefitswhatsfordinner.com/askexpert/inthenews.asp (citing studies concluding that "grass-finished cattle produce beef that is less tender" and that "consumers preferred the overall flavor of grain-finished beef").

it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Here, the notion that, without generic advertising, the free-rider problem will prevent the beef industry from adequately promoting its products is fanciful. The National Cattlemen's Beef Association (NCBA), the dominant national organization of beef producers, boasts that it and its affiliates represent "more than 230,000 cattle breeders, producers and feeders" who voluntarily join to "advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests" through lobbying, political endorsements, and promotional activities *not* funded by the checkoff.[8] An industry that is able to mobilize so many members to promote its interests hardly seems likely to fall apart if it cannot compel dissenters to support its advertising.

Moreover, unlike the beef production industry, which involves thousands of individual farmers and ranchers (as well as larger corporate operations), the beef *packing* industry is highly — and increasingly — concentrated and is dominated by a very small number of very large firms. "Today the top four meatpacking firms ... slaughter about 84 percent of the nation's cattle." Eric Schlosser, *Fast Food Nation* 137-38 (Perennial ed. 2002). Those firms would have ample incentives and resources to promote beef consumption even if the producers' generic advertising were to suffer somewhat from the denial of compelled support.

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[8] www.beef.org/dsp/dsp_locationContent.cfm?locationId=881. The NCBA also conducts much of the checkoff advertising as a "contractor" of the Beef Board. www.beefitswhatsfordinner.com/footer/aboutus.asp.

II. THE BEEF PROGRAM CANNOT BE SUSTAINED AS GOVERNMENT SPEECH.

A. The Government's Arguments Distort the Government Speech Doctrine.

The phrase "government speech" has appeared in this Court's opinions only 12 times, and seven of those opinions have discussed whether speech was attributable to the government solely for Establishment Clause purposes. The government speech doctrine at issue here has been mentioned only five times, and each time the Court has either held that the doctrine did not apply or declined to reach the issue.[9]

As a result, although the government's brief is written as if the government speech doctrine embodied a firmly established and well-developed set of principles, the truth is that, as Judge Luttig has put it, "the 'government speech' doctrine is still in its formative stages, and, as yet, it is neither extensively nor finely developed." *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (opinion respecting denial of rehearing en banc). As Judge Luttig went on to observe, whether particular speech is "government" or "private" is not necessarily a black-or-white question, and some speech may have characteristics of both. *Id.* Determining how to treat compelled support of such speech for First Amendment purposes is not as simple as affixing a convenient label to it.

Unfortunately, the government's analysis in this case overlooks doctrinal uncertainties and factual complexities and labels the beef checkoff advertising government speech

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[9] *See United Foods*, 533 U.S. at 417; *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 483 n.2 (1997); *Keller*, 496 U.S. at 10-11.

based on what it tries to suggest are bright-line tests. Under scrutiny, the government's bright lines fade into obscurity.

The government's principal argument is that the beef advertising is government speech because the boards that oversee the program exercise governmental authority and are therefore government bodies (though they are made up entirely of industry representatives). The government's analysis requires it to ignore the holding of the one decision of this Court that considers the government speech issue most fully and is most nearly on point: *Keller v. State Bar of California*.

In *Keller*, members of the California Bar raised a First Amendment challenge to the requirement that they pay dues to the Bar to support speech with which they disagreed. The Bar's principal argument was that because it was an agency of the government of California, its speech was government speech and, accordingly, the exaction of funds to support its speech was immune from First Amendment scrutiny. This Court, while acknowledging that the Bar did exercise governmental authority in some sense and was a "government agency" under California law, rejected the claim that its speech therefore constituted government speech. The Court explained its holding in words strikingly applicable here:

> The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

496 U.S. at 13. Tellingly, the government cites *Keller* for relatively peripheral points without ever acknowledging, let alone distinguishing, its core holding.

The government further contends that because actions of the Beef Board that infringed the free speech rights of others would be deemed "governmental" for First Amendment purposes under *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), it necessarily follows that its speech must be government speech. Again, however, *Keller* demonstrates that the matter is not nearly so simple. There is no doubt that if the State Bar of California were to discriminate against a lawyer because of his political beliefs, *see Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232 (1957), or even to prevent a lawyer from advertising, *see Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), its actions would be subject to First Amendment scrutiny. Thus, *Keller* proves that entities whose actions are restrained by the First Amendment are not necessarily government *speakers*.

The government also makes much of the fact that the message expressed here (that is, the general theme of promoting beef consumption) was chosen by the government. That the message was chosen by the government, however, does not make a communicative act government speech. For example, in both *Wooley v. Maynard*, *supra*, and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the messages ("Live Free or Die" and "I pledge allegiance to the flag") were certainly chosen by the government. But the speech itself was not government speech, and, quite evidently, it was not held to be immune from First Amendment scrutiny. *See, e.g., Sons of Confederate Veterans*, 305 F.3d at 243 ("The complainant's First Amendment interests were implicated in *Wooley* because the message in question, displayed on his license plate, would be attributed to him.") (Williams, J., concurring in denial of rehearing).

Of course, in *Barnette* and *Wooley*, the government expressed its chosen message either by compelling individuals to repeat it (in *Barnette*) or by emblazoning it on private property (in *Wooley*). But here, too, the actual speaking is not done by the government, but by private entities, such as the National Cattlemen's Beef Association, who contract to develop and carry out the advertising campaigns funded by the checkoff program, and other private persons are compelled to support the messages conveyed by the private speakers.

To be sure, the beef advertising, though carried out through private speakers, is funded with checkoff dollars collected by the government. The government thus makes much of *Rust v. Sullivan*, 500 U.S. 173 (1991), which it discusses as if that case held that speech subsidized by the government is, necessarily, government speech. But *Rust* itself never mentions the term "government speech." And however one may view the Court's later characterization of *Rust* as a government speech case (*see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001); *but see id.* at 554 (Scalia, J., dissenting)), its holding remains relatively narrow: When a private person *accepts a government subsidy to disseminate a particular message*, his First Amendment rights are not violated by the government's insistence that he stick to that message and not contradict it. *See Velazquez*, 531 U.S. at 541-42.

But that does not mean that all government-subsidized speech is government speech. Indeed, *Velazquez* is directly to the contrary: It holds that sometimes a subsidy means that the government has decided to provide financial support for "private, *nongovernmental speech*," *id.* at 544 (emphasis added), and such subsidies remain subject to First Amendment scrutiny. Moreover, nothing in *Rust* suggests that private individuals may not complain when *they* are singled out to subsidize other private speakers who are conveying a government-favored message that they disagree with.

Finally, the government relies on the fact that the Secretary of Agriculture must formally approve all advertising

conducted under the beef checkoff program. But this Court's refusal to entertain the government speech argument in *United Foods* was predicated on the view that the Secretary's formal approval authority was not enough to answer the government speech question. Thus, the Court observed that one reason it would not reach the issue was that the analysis could require some inquiry into whether the Secretary's approval was more than merely pro forma (which the government for the most part avoids addressing here), as well as "other difficult issues." 513 U.S. at 417. But on the theory advanced by the government here, the Court was just wrong in *United Foods* to think that the government speech question involved any "difficult issues." Under the government's theory, the Court's very framing of the issue in *United Foods* would be enough to answer the government speech question: Because the speech was "sponsor[ed]" and "underwrit[ten]" by the government (513 U.S. at 410), it was necessarily government speech. Thus, according to the government, the First Amendment inquiry undertaken by the Court in *United Foods* was fundamentally flawed from the outset, and the resulting decision was constitutionally meaningless.

In sum, the government speech question is not as simple as the government would have it. Answering it requires a searching examination of the nature of the entities and of the speech itself. And here, such an examination of the speakers and the speech demonstrates that the beef checkoff advertising should not be exempt from First Amendment scrutiny.

B. The Beef Ads Are Not Government Speech.

Like the bar organization in *Keller*, the Beef Board itself does not "participate in the general government" of the United States. *Keller*, 496 U.S. at 13. Indeed, the Board plays even less of a governmental role than did the California State Bar, for while the Bar at least had responsibilities with respect to "governing the legal profession," *id.*, the Beef Board does not regulate beef production at all. It exists simply to administer the checkoff program itself.

Another similarity to *Keller* is that the members of the Beef Board "are such not because they are citizens or voters, but because they are" beef producers (*id.*), and that the Board derives its revenues from assessments on members of the industry. *Id.* at 11. And once again, there is another factor that suggests that checkoff-funded speech is even less attributable to the government than the Bar's speech was in *Keller*: The Beef Board, unlike the Bar, does not generally speak for itself, but carries out its promotional activities through private contractors, like the NCBA, who develop and implement the advertising campaigns themselves. These factors strongly suggest that, as in *Keller*, the speech in question should not be considered that of a government agency.

Examination of the speech funded by the checkoff program confirms that it is not, in any meaningful sense, government speech.[10] To begin with, checkoff-funded advertisements and other communications typically do not tell consumers that they represent the views of the government, but instead say that they are "Funded by America's Beef Producers." Indeed, far from purporting to speak on the government's behalf, checkoff-funded promotional materials refer to the government in the third person. For example, a part of the checkoff program website that offers nutritional advice to consumers responds to the question "Shouldn't I be avoiding saturated fat?" with this advice: "The government tells us to limit saturated fat ...."[11] By contrast to "the government," the website clearly identifies the checkoff ads with "the beef industry," as in this example: "**Why has the beef industry**

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[10] Examples of checkoff-funded communications are available on the internet at www.beefitswhatsfordinner.com, a website established by the NCBA to reproduce checkoff-funded print, television, and radio advertisements, and to provide additional checkoff-supported information on cooking, nutrition, and other beef-related subjects.

[11] www.beefitswhatsfordinner.com/asxexpert/nutrition.asp.

launched nutrition advertising? We're proud of our product."[12]

The messages conveyed by the checkoff advertising also reveal that this is not really our federal government speaking to us. The checkoff-funded ads, for example, encourage consumption of beef over chicken by downplaying concerns about fat. Touting very small servings of less-popular, very lean cuts of beef, one ad asserts that "LEAN BEEF'S ACTUALLY LOWER IN FAT THAN YOU THINK," and asks rhetorically, "MAKES YOU WONDER ABOUT EATING ALL THAT SKINLESS CHICKEN, DOESN'T IT?"[13] Another ad pictures slices of rare beef and announces: "ONLY ONE MORE GRAM OF SATURATED FAT THAN A CHICKEN BREAST. BUT STEAK KNIVES ARE HEAVY, **SO IT EVENS OUT.**"[14] One wonders if the Surgeon General would concur. Is it really federal government policy that consumers should choose beef over chicken?

In fact, we know that when the government itself speaks to us about nutrition and health, it encourages us to limit both the number of servings and the serving size of foods in the meat group (which also includes poultry, fish, eggs, legumes and nuts), to about two three-ounce servings per day for most adult men, and less for most women and children; in addition, the government urges us to choose lean cuts of meat.[15] Although some beef checkoff advertising does show three-ounce servings of lean cuts, other checkoff ads depict consumers enjoying very large servings of high-fat cuts. For example, the television commercial "Grilling" depicts a father

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[12] www.beefitswhatsfordinner.com/askexpert/advertising.asp.

[13] www.beefitswhatsfordinner.com/ads/default.asp#.

[14] *Id.*

[15] *See* U.S. Departments of Agriculture and Health & Human Services, *Nutrition and Your Health: Dietary Guidelines for Americans* (2000), available at www.health.gov/dietaryguidelines/#current.

grilling two thick t-bone steaks (cuts that, while tasty, are extremely high in fat) and three plump hamburgers to serve a family of four.[16] Conservatively assuming five ounces apiece for the burgers and 14 for the steaks, this family is about to consume in one meal about twice as many servings of meat as the government recommends for an entire day. Another checkoff program print ad consists of a photograph of two massive grilled t-bones with the slogan, **"WHY SPACE ALIENS STEAL OUR COWS."**[17]

The fact is that these promotional activities do not represent a government effort to convey information to citizens, but an industry hard-sell. As the NCBA put it in a recent press release touting the checkoff program's achievements, the ads successfully convey the message that "beef is expensive, but worth it," and they make people "feel better about eating beef."[18] The checkoff advertising campaign's successful effort to "reinforce[e] the passion consumers have for beef" won it the "the advertising industry's most prestigious award, the gold Effie," whose other winners "included IBM, Kellogg and Pepsi" (whom no one, presumably, would confuse with government speakers).[19]

Another telling example helps illustrate the real nature of the checkoff program. Just weeks before the submission of this brief, the NCBA announced another initiative of the checkoff program: a "partnership" with Quiznos Sub, a national fast-food restaurant chain, to promote its new "Steak-

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[16] "Grilling" can be viewed at www.beefitswhatsfordinner.com/ads/tv.asp.

[17] www.beefitswhatsfordinner.com/ads/print2.asp#.

[18] NCBA, *Checkoff News: Beef Messages Delivered to Millions of Consumers this Year; Award-Winning Advertising Providing Foundation For Other Checkoff-Funded Beef Promotion Efforts* (Aug. 11, 2004), www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2720.

[19] *Id.*

house Beef Dip Sub."[20] The NCBA press release announcing the promotion begins with the stirring proclamation: "What this world needs is more beef sandwiches."[21] Could this possibly be the government of the United States speaking? Does Uncle Sam really want you — *to eat more Quiznos subs?*

The way the checkoff advertising is carried out also blunts the government's supposed "political accountability" for the speech. *Cf.* Fed. Pet. Br. 19. Because the ads are funded exclusively by the industry, created by industry members, and presented as coming from "America's Beef Producers," it is extremely unlikely that members of the public will hold elected officials accountable for them. Indeed, most consumers would no more think of holding the government responsible for the beef industry's "Beef, It's What's for Dinner" campaign than for the jingles of McDonald's or the Coca-Cola Company.

In sum, there is no question but that the checkoff program, like the mushroom program in *United Foods*, is "government-sponsored," but only in the sense that the government has chosen to facilitate speech that promotes private, not public interests. That, in itself, should not suffice to transform an industry's promotional campaign into government speech or to immunize it from First Amendment scrutiny. The messages at issue here are not of the same character as those we receive when the government genuinely speaks to us in its own name in fulfillment of its own programs and policies.

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[20] NCBA, *Checkoff News: Beef Checkoff Partners with Quiznos Sub to Promote New Steak Sandwich* (Sept. 9, 2004), http://www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2783.

[21] *Id.*

C. Invalidating the Beef Checkoff Program Will Not Threaten True Government Speech.

The government asserts that affirming the Eighth Circuit in this case would imply that any taxpayer could withhold whatever portions of her taxes went to support any government speech with which she disagreed. The government's fears are entirely unwarranted.

To begin with, this case, like *United Foods* and *Keller*, challenges only targeted assessments that require members of particular groups to associate with and support messages with which they disagree. The distinguishing feature of such exactions is that they raise funds earmarked to support speech from groups that include "persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *United Foods*, 533 U.S. at 413. Thus, this case in no way concerns the use of general tax revenues or other funds that are not exacted in the challenged manner.

Nor does this case involve communications that decisionmakers in an agency that genuinely exercises government authority have determined to make in the exercise of that authority, in the interest of the government and/or the public at large, and in the government's own name. Such speech, whether funded with general tax revenues or even a tax on a particular industry, is quite distinct from speech that is no more than an industry's promotion of its own product.[22]

For example, in *R.J. Reynolds Tobacco Co. v. Shewry*, __ F.3d __, 2004 WL 2158901 (9th Cir. Sept. 28, 2004), California had enacted legislation requiring the state's Depart-

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[22] Even the most ardent academic supporters of a broad government speech doctrine agree that "government should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message." Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1510 (2001).

ment of Health Services to develop a media campaign to discourage smoking, and it had imposed a surtax on tobacco sales to fund the program. The ads, which directly attacked the tobacco industry, made clear that they were "Sponsored by the California Department of Health Services." *Id.* at *2.

Rejecting a claim by cigarette companies that compelling them to provide financial support for the program violated the First Amendment, the Ninth Circuit upheld the use of a targeted tax to fund the ads because the speech at issue was truly governmental. The court explained:

> When a union, a state bar association or even a mushroom growers' association speaks, it represents only the interests of that particular entity. When California uses funds from the tobacco surtax to produce advertisements, it does so in the name of all of California's citizens. ... That California has chosen to fund a valid public health message through a targeted excise tax does not mean that it is no longer speaking as the State of California.

Id. at *7.[23]

The court was careful to recognize, moreover, that the government may not "avoid the limits of the First Amendment simply by labeling a compelled contribution a contribution to the government's own speech." *Id.* at *8. The beef checkoff program is precisely what the Ninth Circuit had in mind when it referred to situations where government speech is merely a convenient label, not a reality. *See id.* Thus, holding the beef checkoff program to be subject to First Amendment analysis would not affect the result in *Reynolds* or similar cases — one way or the other.

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[23] As the court's opinion suggests, the matter might be different if the ads said they were sponsored by the tobacco industry, thus indicating a direct association between members of the industry and the anti-industry sentiments with which they disagreed.

Nor would a ruling against the checkoff program give public university students the right to withhold tuition because they disagreed with statements made by professors in particular courses or with other speech attributable to the university itself. To begin with, tuition is not an exaction imposed upon persons because they fall within some group of which they "must remain members ... by law or necessity." *United Foods*, 533 U.S. at 413. It is a payment for educational services that students have chosen, and paying it does not in any way identify them with course offerings with which they disagree. (In this way, tuition is different from added fees imposed on students and used directly to support private speech. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000).)

Just as importantly, the speech of professors and other university personnel is integral to a public university's performance of a traditional government function — the provision of public higher education. As such, it is governmental in a way that speech promoting an industry's private interests is not.[24] As this Court suggested in *Southworth*, a university could hardly carry out its function if every student who paid tuition could claim a First Amendment violation whenever a professor said something she disagreed with. *See id.* at 234-35.

This is not to suggest that there are no circumstances in which the funding of even true government speech could pose genuine First Amendment issues. Suppose, for instance, that a state government, or the federal government, were to

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[24] Even this example illustrates that the government/private speech dichotomy is not entirely clear-cut, because the speech of professors is not purely governmental: It is also their own academic expression, and the First Amendment offers some protection to academic freedom of speech. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197-98 & n.6 (1991) (recognizing dual role of government in public universities as both "speaker" and "regulator" of academic speech).

determine that it was desirable to erect billboards, asserting that abortion is a constitutionally protected right and expressing the government's disapproval of those who would interfere with that right, on public rights-of-way adjacent to the offices of right-to-life groups. Suppose further that the government paid for the billboards with a special levy imposed only on the occupants of the adjacent buildings. Would no First Amendment issue be posed?[25]

Perhaps even the hypothetical program in this example could be upheld on a government speech rationale. This case, however, provides no occasion for probing the precise extent to which the funding of *genuine* government speech is or is not exempt from First Amendment scrutiny. It is enough to resolve this case to hold that the speech at issue here, which amounts to no more than an industry's promotion of its products, cannot be saved from invalidation under *United Foods* by calling it "government speech."

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[25] A somewhat similar scenario was presented in *Summit Medical Center of Alabama v. Riley*, 284 F. Supp. 2d 1350 (M.D. Ala. 2003), where the court struck down Alabama's Women's Right-to-Know Act, which required abortion providers to distribute government-prepared anti-abortion pamphlets to women seeking abortions and imposed a targeted fee on the providers to pay for them. While the case is arguably distinguishable from the California tobacco case because of the compelling public health purpose served by the anti-tobacco advertisements and the burden Alabama law's placed on pro-abortion speech, both cases help illustrate that the issue of government speech is more complex than the government recognizes. *See* Fed Pet. Br. 11 ("the government may say what it wishes without implicating the First Amendment.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Scott L. Nelson
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorney for Amicus Curiae[26]

Date: October 15, 2004

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[26] Counsel wishes to acknowledge the assistance of Deepak Gupta, a fellow at the Alan Morrison Supreme Court Assistance Project and a 2002 graduate of Georgetown University Law Center not yet admitted to the bar, in the preparation of this brief.

Nos. 03-1164 & 03-1165

In The
Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, *ET AL.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,

Respondents.

NEBRASKA CATTLEMEN, INC., *ET AL.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ROSE ACRE FARMS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

CORINNE R. FINNERTY
McCONNELL & FINNERTY
Post Office Box 90
North Vernon, IN 47265
(812) 346-5201

Counsel of Record for Amicus Curiae

LOREN D. REUTER
3750 State Road 135 North
Nashville, IN 47448
(812) 988-7571

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST

Rose Acre Farms, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for the petitioners, Ann Veneman, Secretary, United States Department of Agriculture, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones, has been obtained. The consent of the attorneys for the respondents, Livestock Marketing Association, *et al.*, was requested but refused.

The interest of Rose Acre Farms, Inc. in these cases arises from the fact that it is the nation's second largest egg producer and the American egg industry is subject to statutes and regulations which are similar to those at issue in these cases. 7 U.S.C. §§2701, *et seq.*; implemented by the Egg Research and Promotion Order appearing at 7 C.F.R. §§1250, *et seq.* Rose Acre Farms, Inc. does business throughout the U.S. and paid in excess of $1.2 million dollars in assessments during its last fiscal year which were used by the American Egg Board to fund generic egg advertising with which Rose Acres disagrees. "The Incredible, Edible Egg" campaign is one example. The American Egg Board spent at least 57% of its revenues of $19.993 million dollars in the 2003 calendar year on advertising and promotional activities.

Rose Acre Farms, Inc. produces specialty eggs which have enhanced nutritional value due to the use of special chicken feeds and also produces cage free eggs, neither of which types of eggs are advertised by the American Egg Board. Rose Acre Farms, Inc. is also participating in the United Egg Producers' Animal Care Certified Program which certifies that chickens producing eggs are treated in a humane manner. This program includes minimum standards for cage space, air quality, molting practices, and beak

trimming practices. The generic advertising engaged in by the American Egg Board promotes the consumption of eggs which do not meet these high quality standards. It conveys a message that eggs are a generic product that bear no distinction based on where and how they are produced.

Maintenance of the Animal Care Certified Program quality standards increases the cost of producing eggs. Therefore, generic advertising which fails to differentiate between eggs produced by Animal Care Certified Program participants and non-participants has the effect of imposing a competitive disadvantage on program participants. Thus, generic advertising by the American Egg Board has the added negative effect of reducing or eliminating any incentive on the part of egg producers to participate in the Animal Care Certified Program which is intended to improve the conditions under which chickens producing eggs live.

The American Egg Board generic advertising also promotes the consumption of eggs produced outside the U.S. with which Rose Acre Farms, Inc. disagrees.

Respectfully submitted,

CORINNE R. FINNERTY
MCCONNELL AND FINNERTY
Counsel for Rose Acre Farms, Inc.
Post Office Box 90
North Vernon, IN 47265
(812) 346-5201

Of Counsel:

LOREN D. REUTER
Counsel for Rose Acre Farms, Inc.
3750 State Road 135 North
Nashville, IN 47448
(812) 988-7571

QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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SUMMARY OF THE ARGUMENT[1]

I. THE BEEF ACT VIOLATES THE FIRST AMENDMENT BECAUSE IT COMPELS CATTLE PRODUCERS AND IMPORTERS TO PAY ASSESSMENTS TO FUND GENERIC ADVERTISING WITH WHICH THEY DISAGREE

"Beef. It's What's For Dinner." is a message intended to promote the beef industry throughout the U.S. However, this message is anathema to some beef producers who object to it because it promotes the consumption of beef produced outside the U.S. It is objectionable to other beef producers because it lumps all beef producers together without regard to their method of production. This case presents the question of whether a beef industry trade group operated under the limited supervision of the U.S. Department of Agriculture can compel dissenting beef producers to contribute to generic advertising with which they disagree.

The Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.* and its accompanying regulations set up organizations composed of private individuals from the beef industry whose purpose is to promote the industry. The Secretary of Agriculture appoints members

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[1] Ann Veneman, Secretary, United States Department of Agriculture, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones, have consented to the filing of this brief. Letters of consent have been filed separately with the Clerk of the Court.

The consent of the respondents, Livestock Marketing Association, *et al.*, was requested but refused.

This brief was authored in its entirety by counsel for the *Amicus*. No person or entity, other than the *Amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

to the Beef Board, but they must be industry representatives generally nominated by eligible state beef councils. The Beef Act requires beef producers and importers to pay a $1.00 per head assessment for each head of cattle sold to fund promotional activities, primarily generic advertising. The Beef Promotion Operating Committee (Committee) has the responsibility to develop plans and projects for this promotional activity. The Secretary appoints ten of twenty members of the Committee, who must be members of the Beef Board, i.e., industry representatives. The remaining ten members of the Committee are producers elected by a federation that includes as its members qualified state beef councils, again industry representatives.

The Secretary does have authority to remove members of the Beef Board, approve budgets, and approve specific advertising campaigns, but rarely vetoes a proposed advertising campaign. The principal object of the Beef Program is the generic commercial speech that it funds. At least one half of the assessments paid to the Beef Board are used for advertising. Certain producers object to paying the assessments because the generic advertising it funds promotes beef consumption in general, which includes the consumption of beef produced outside the U.S. Some producers object to paying for the advertising because it does not differentiate among beef products.

The Committee is an organization composed of private individuals representing one segment of the population with certain common interests. The commercial speech that it funds is compelled private speech, not government speech. Not all government-facilitated speech is government speech. The Secretary's supervisory responsibilities are not sufficient to transform the beef industry's self help program into government speech. As such, it is subject to First Amendment analysis. The Beef Program violates the

First Amendment because it impinges on the producers' free speech and association rights.

II. COMPELLED GENERIC ADVERTISING UNDER THE BEEF ACT IS NOT A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

Advertising is commercial speech which is entitled to less First Amendment protection than other constitutionally guaranteed expression. When a private party engages in advertising, the government is free to regulate it to prevent it from being false, deceptive, or misleading. This includes a right to compel an advertiser to make certain disclosures to prevent its commercial speech from being false, deceptive, or misleading. No one is claiming that voluntary advertising placed by beef producers is false, deceptive, or misleading. Therefore, the compelled generic advertising done by the Committee cannot be upheld as a form of compelled advertising disclosure under applicable law.

It is not appropriate to apply the *Central Hudson* test for restrictions on speech to analyze the First Amendment issues presented by this case. The *Central Hudson* test applies to cases involving restrictions on speech. The Beef Program's assessments do not restrict speech, they compel producers to pay for private speech with which they disagree.

III. GENERIC ADVERTISING UNDER THE BEEF ACT CANNOT SURVIVE FIRST AMENDMENT SCRUTINY AS PART OF A BROAD REGULATORY SCHEME

The Court has not upheld compelled subsidies for speech in the context of programs where the principal

object of the program is the speech that it funds. An overriding associational purpose independent from the speech itself may permit compelled speech subsidies. The Court has found such overriding associational purposes to permit compelled speech in cases involving union shops, state-mandated integrated bar associations, and heavily regulated agricultural cooperatives.

The beef industry is not a heavily regulated agricultural cooperative. While it is subject to certain government regulations, beef producers are not bound together and are not required to market their products as members of an agricultural cooperative according to cooperative rules. They remain free to make independent marketing decisions. There are no marketing orders that regulate how beef may be produced and sold. The beef producers remain free to engage in independent market activity. As such, some beef producers should not be permitted, with the government's help, to compel dissenting producers to pay for generic advertising with which they disagree.

ARGUMENT

I. THE BEEF ACT VIOLATES THE FIRST AMENDMENT BECAUSE IT COMPELS CATTLE PRODUCERS AND IMPORTERS TO PAY ASSESSMENTS TO FUND GENERIC ADVERTISING WITH WHICH THEY DISAGREE

Beef may be what's for dinner, but not all beef producers wish to serve the same type of beef or associate with each other in the generic promotion of beef. The beef industry in the U.S. is a large and diverse industry.

Thirty-one states have at least 10,000 beef cattle operations. *See* pp. 5-6, Brief of Texas, 32 Other States and Puerto Rico as *Amici Curiae* in Support of Petitioners. Congress passed the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.*, to promote the beef industry due to its importance to the U.S. economy. The Beef Act and the order implementing it creates a structure of beef industry organizations whose principal object is the funding and expression of the generic commercial speech which is the subject of this case. All beef producers and importers are compelled to pay the assessments provided for by the Beef Program to fund this generic commercial speech. Certain industry representatives serve on the various state beef councils and the Beef Operating Committee and are empowered to spend the $82.7 million dollars generated by the beef checkoff program in 2003 to promote the industry. *See* p. 7, Brief of Federal Petitioners. At the federal level, twenty beef industry representatives on the Committee are charged with developing and overseeing the Beef Board's promotion program subject to the Secretary of Agriculture's "veto" power.

The Beef Board is composed of private individuals who are appointed by the Secretary of Agriculture. 7 U.S.C. §2904(1). Members of the Beef Board must be cattle producers and importers appointed by the Secretary from nominations submitted by eligible state beef councils, or if there is none for a particular state, in a different manner. Importers are nominated in a manner determined by the Secretary. *Id.* The Secretary does not enjoy plenary discretion to appoint anyone whom he or she pleases to the Beef Board. The number of Beef Board representatives is determined by the inventory of cattle in a particular unit. *Id.* The composition of the Beef Board has been carefully

controlled to ensure that it represents private industry interests in proportion to the inventory of cattle in a particular geographic unit. The Beef Act has been described as a "self help" measure that enables the beef industry to employ its own resources and devise its own strategies to increase beef sales, while avoiding the intrusiveness of government regulation. The Beef Promotion and Research Program receives no direct funding from the federal government. General tax revenues are not used to fund the program. *United States v. Frame,* 885 F.2d 1119, 1121 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

The Beef Act requires beef producers and importers to pay an assessment of $1.00 per head for each head of cattle sold to fund promotional activities, primarily generic advertising. *Livestock Marketing Ass'n, et al. v. U.S. Dept. of Agric., et al.,* 207 F. Supp.2d 992, 997-998 (D.S.D. 2002) (*LMA II*). At least 50% of the assessments imposed on cattle producers and importers paid to the Beef Board are used for advertising. *Id.* at 997-998, 1002. The District Court found that the principal object of the beef checkoff program is the commercial speech that it funds. *Id.* at 997-998, 1002. At least some of the beef producers disagree with the type of advertising done by the Beef Board as it implies that beef is all the same and promotes all beef products, rather than only American beef products. *Id.* at 996-997. Forty-five states have established qualified state beef councils which may retain up to half of the checkoff assessments they collect to fund in-state promotion and other programs. 7 C.F.R. §1260.172; Trial Tr. 206-07, 316. Congress has granted beef councils very broad powers to promote the image and desirability of beef and beef products. 7 U.S.C. §2902(13), (14). Thus, an organization composed of private individuals representing private

interests receives funding compelled by the government and uses that funding to promote beef products in a manner which the private individuals determine. Individual producers and importers have no right to control the content of the advertising, nor may they opt out of supporting it, even though the generic advertising may, in their view, actually injure rather than promote their particular operations.

Even speech which is clearly government speech coming directly from the government and whose content is explicitly dictated by the government can violate the First Amendment when individual citizens are compelled to become a courier for it. *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). This right was first announced in *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624 (1943) "in which the Court held that school children with religious objections to the flag saluting ceremony have the constitutional right to be free from compulsion . . . to declare a belief." [internal citations omitted] *Frame,* p. 1130.

The First Amendment protects not only the right of freedom of expressive association, but also a right not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 623 (1984). Likewise, the First Amendment protects not only the right to speak, but also the right to "refrain from speaking". *Wooley, supra.* "Compelled contributions to private groups engaging in first amendment activities have been held to implicate these two aspects of first amendment liberty". *Frame, supra,* p. 1130.

"The reason for permitting the government to compel the payment of taxes and to spend money is that the government is the representative of the people. The same

cannot be said of a union, which is representative only of one segment of the population, with certain common interests." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 259 (1977), Justice Powell concurring. The Beef Board is an entity representative of one segment of the population with common interests, rather than the representative of the people, therefore its speech is private speech and the generic advertising done with beef checkoff funds is compelled private speech, not government speech.

"First Amendment values are at serious risk if the government can compel a . . . discrete group of citizens, to pay special subsidies for speech on the side that it favors . . ." *United States v. United Foods*, 533 U.S. 405, 411 (2001). *United Foods* did not consider the question of whether advertising funded by mandatory assessments similar to those at issue in this case is government speech immune from the scrutiny applied to other compelled speech because that argument was not raised in the Court of Appeals. *Id.* at 416. That issue is now squarely before this Court.

The Third, Fifth, Sixth, and Eighth Circuits have addressed the application of the government speech doctrine to generic marketing programs and concluded that this type of producer-funded marketing is not government speech. *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 429 fn. 13 (5th Cir. 2004). The Fifth Circuit has explained that, "The fact that the government has an interest in facilitating private speech does not convert that speech into a governmental message." It rejected the government's argument that alligator marketing is government speech because the applicable council's governing statutes lay out specific goals and articulate the state's interest in the promotion of the alligator industry. *Id.* at

430 fn. 14. The government's argument invites the conclusion that all commercial advertising could be considered government speech and funding for it compelled by the government through a plethora of industry trade organizations as the government could be said to have an interest in all forms of economic activity which create jobs and outlets for the consumption of products produced in the U.S. or by U.S.-based companies.

"Not all government-facilitated speech is government speech. The government speech doctrine does not apply if a program is 'designed to facilitate private speech, not to promote a governmental message.' *Velazquez,* 531 U.S. at 542, 121 S.Ct. 1043". *Pelts & Skins, LLC v. Landreneau,* 365 F.3d 423, 429 (5th Cir. 2004).

The Beef Board and the individual state beef councils are not governmental entities whose activities are protected by the government speech doctrine. The following facts distinguish a private entity from a government entity for the purpose of determining whether an organization's speech is private speech or government speech:

1. Private funding from dues levied on members;
2. Membership restricted to persons engaged in a certain profession who are required to join the organization;
3. Regulatory functions reserved to a governmental entity.

Keller v. State Bar of California, 496 U.S. 1, 11-13 (1990).

The Beef Board meets all of the above tests for a private entity:

1. Private funding from assessments levied on the sale and importation of beef;

2. Membership is composed of beef producers and importers;

3. The enforcement of the Beef Program is reserved to the Secretary of Agriculture and jurisdiction is vested in the district courts of the United States to enforce, and to prevent and restrain a person from violating, an order or regulation made or issued under it. 7 U.S.C. §2908.

The powers of the Beef Board are limited to those set forth in 7 U.S.C. §2904(2). It is the Beef Promotion Operating Committee provided for by 7 U.S.C. §2904(4)(A) which has the responsibility to "develop plans or projects of promotion and advertising, research, consumer information, and industry information which shall be paid for with assessments collected by the Board." 7 U.S.C. §2904(4)(C). The Operating Committee is composed of ten members elected from the membership of the Beef Board and ten producers elected by a federation that includes as its members the qualified state beef councils. 7 U.S.C. §2904(4)(A). Thus, a majority of the members of the Operating Committee are not appointed by the Secretary of Agriculture and all of the members of the Operating Committee are beef industry producers and/or importers.

It has been held, however, that advertising funded under the Beef Act is government speech, and, therefore, not subject to First Amendment analysis. *Charter v. USDA*, 230 F. Supp. 1121 (D.C. Mont. 2002). *Charter* held that through the Beef Act, Congress and the USDA use private speakers to disseminate a government message which is a recognized form of government speech. *Id.* at

1138. This result was reached primarily in reliance on *Rust v. Sullivan,* 500 U.S. 173 (1991); and *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000). *Rust* is easily distinguishable from this case as it involved a challenge to the funding of family planning programs. Congress and the Department of Health and Human Services created a program that funded family planning but required that funds not be distributed to programs where abortion was used as a method of family planning. Those challenging the legislation as unconstitutional argued that withholding funding from programs that discussed abortion was unconstitutional because it discriminated against a particular viewpoint. The Court held that choosing not to fund speech does not constitute suppression of speech and that a decision not to fund the exercise of a fundamental right does not infringe that right. *Rust v. Sullivan,* at 772. The Court noted that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . ." *Id.*

This case does not involve a claim that the Beef Board, or the Secretary, should fund alternative types of beef advertising expressing different viewpoints. Therefore, the *Rust* analysis does not fit the facts of this case.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) is a school prayer Establishment Clause case in which a high school adopted a policy that permitted, but did not require, a student-led prayer before home football games. The prayer or invocation was authorized by a government policy, and took place on government property at government sponsored events. The school did not create an open forum for the student body at the games, but allowed only one student to give the invocation for the entire season and created specific regulations that defined the content

and topic of the message. The Court held that the invocation was government speech endorsing religion which the Establishment Clause forbids. *Id.* at 2275. The Court explained that the delivery of a school sponsored religious message over the school's public address system by a speaker representing the student body under the supervision of school faculty and pursuant to a school policy that encourages public prayer is not properly characterized as private speech. *Id.* at 2279.

Establishment Clause cases have developed their own particular analytical rules which are not as useful in analyzing compelled speech cases such as this one. However, it should be noted that the generic advertising at issue in this case is not targeted for display on government property at government sponsored events to a "captive audience" of attendees. The advertising appears in a wide variety of private commercial media where it competes with other food advertising seeking to influence consumers' food choices and spending habits.

The Sixth Circuit has held that compelled generic advertising for pork products under the Pork Promotion, Research and Consumer Information Act, 7 U.S.C. §§4801 *et seq.* (the "Pork Act"), is private speech due to the pork industry's extensive control over the promotional activities funded by the pork checkoff program. *Michigan Pork Producers Ass'n, Inc. v. Veneman,* 348 F.3d 157, 161 (6th Cir. 2003). The Sixth Circuit held the following facts supported its conclusion:

1. The primary purpose of the Pork Act is to strengthen the pork industry's market position and increase domestic markets for pork products;

2. The funding for the generic advertising does not come from general tax revenues; and,

3. The government exercises only limited oversight over the programs. *Id.*, 161-162.

The generic advertising purchased with beef checkoff assessments is private speech for the same reasons:

1. The primary purpose of the Beef Act is to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. 7 U.S.C. §2901(b).

2. The funding for the generic advertising does not come from general tax revenues, but from assessments on all cattle sold and imported into the U.S. *Id.*

3. The government exercises only limited oversight over the programs.[2]

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[2] The following facts were found to have established only limited government oversight of the Pork Program in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157, 162 (6th Cir. 2003):

> "Only one USDA staff member is responsible for overseeing all of the duties relating to the Pork Checkoff Program, including attending all meetings of the Pork Board and reviewing all advertisements and communications it develops. The government itself does not propose or draft any of the advertisements. . . . The Pork Board itself is comprised only of private pork producers, appointed by the Secretary based on nominations made by private state pork producers associations – which themselves are run entirely by industry officials."

Further details about the organizational structure and operations of the Pork Program are set forth in the District Court opinion in the case:

> "Under the Pork Act, the Pork Board's planning and operations are to be overseen and approved by the Secretary of

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The Fifth Circuit has identified three factors which it held establish that compelled generic alligator advertising by the Louisiana Fur and Alligator Advisory Council (the "Council") is government-facilitated private speech of fur and alligator harvesters:

1. Funds used by the Council for generic advertising do not come from general state revenues, but from fees levied on harvesters of furs and alligators.

2. An organization that represents private interests, the Council, is responsible for the generic marketing campaign.

3. The composition of the council demonstrates that it represents primarily private interests.[3]

Agriculture. 7 U.S.C. §4808(b)(1). The Secretary also has administrative authority to fire Board members when continued service would be 'detrimental' to the purposes of the Pork Act. 7 C.F.R. §1230.55. . . . Pork Board members are selected on a representational basis from nominees made by the National Pork Producers Delegate Body, 7 U.S.C. §§4806(g) and 4808(a). . . . [T]he Department of Agriculture regularly reviews the advertising and other project budgets of the Pork Board. . . . Similarly, the Department reviews each Pork Act advertisement before airing. . . . This kind of review results in amendments of only approximately four percent of the ads shown to the Department." *Michigan Pork Producers Ass'n, Inc., et al. v. Campaign for Family Farmers, et al.*, 229 F. Supp.2d 772, 786-787 (W.D. Mich. 2002).

The Beef Program operates in a virtually identical manner. *See* pp. 4-7, Brief for the Federal Petitioners.

[3] The Louisiana Fur and Alligator Council is a government creation. The Louisiana Secretary of Agriculture (or his designate) serves *ex officio* along with eleven other appointed members. The

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Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 429-430 (5th Cir. 2004).

The same three considerations compel the conclusion that Beef Program compelled generic advertising is government-facilitated private speech:

1. Funds used by the Beef Operating Committee for generic advertising do not come from general government revenues, but from assessments imposed on beef producers and importers engaged in the sale and importation of beef and beef products. 7 U.S.C. §2901(b).

2. An organization that represents private interests, the Beef Operating Committee, is responsible for the generic marketing campaign.

3. The composition of the Beef Operating Committee demonstrates that it represents primarily private interests.[4]

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speaker of the House and the president of the Senate each appoint one member. The remaining nine members are appointed by the Secretary, however, they must represent "a cross section of trappers, alligator hunters, coastal landowners, and alligator farmers". Two of the nine members must represent a private organization, the Louisiana Alligator Farmers and Ranchers Association. The Secretary appoints the remaining seven members based on nominations from the Louisiana Trappers and Alligator Hunters Association. *Pelts & Skins, LLC v. Landreneau,* 365 F.3d 423, 430 (5th Cir. 2004).

[4] The Beef Promotion Operating Committee consists of ten members of the Beef Board and ten producers elected by a federation that includes as members the qualified state beef councils. The producers elected by the federation must be certified by the Secretary of Agriculture as producers that are directors of a qualified state beef council. 7 U.S.C. §2904(4)(A). The Beef Board from which ten members of the Beef Promotion Operating Committee must be selected consists

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The Third Circuit has twice held that generic advertising financed with assessments imposed on agricultural producers is not government speech: *Cochran v. Veneman, et al.*, 359 F.3d 263, 268 (3rd Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1132 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); however, it has modified its analysis of the issues presented by the cases as a result of *United Foods* and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

The *Frame* court did not have the benefit of the guidance of either *United Foods* or *Glickman*, but did determine that the Beef Act implicated the producers' First Amendment free speech and association rights. However, the *Frame* court ultimately upheld the Beef Act, applying a *Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) analysis to the free speech claim and a *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) analysis to the association claim. *Frame*, pp. 1133-1134. The *Frame* court's strictest scrutiny was brought to bear on the association claim. The court stated that it would sustain the constitutionality of the Beef Act only if the government could demonstrate that it was adopted to serve compelling state interests that are ideologically neutral and that cannot be achieved

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of cattle producers and importers nominated by eligible state organizations and importers. 7 U.S.C. §2904(1). Thus, while the Secretary of Agriculture retains authority to appoint members of the Beef Board, her possible selections are limited to beef industry representatives nominated by private parties. Likewise, ten members of the Beef Promotion Operating Committee, one half of its membership, are elected by a private federation. Clearly all of the members of the Beef Board and the Beef Promotion Operating Committee represent beef industry private interests.

through means significantly less restrictive of free speech or associational freedoms. The court concluded that the importance of the government's interest justified the slight incursion on Frame's associational and free speech rights. *Frame,* p. 1134.

The Third Circuit recognized that the *Frame* analysis had been abrogated by *United Foods* and *Glickman* in *Cochran v. Veneman, et al.,* 359 F.3d 263, 274 (3rd Cir. 2004), *cert. pending*. *Cochran* involved a challenge to The Diary Promotion Stabilization Act of 1983, 7 U.S.C. §§4501 *et seq.* and its accompanying compelled assessments for advertising. Under the Dairy Act, producers of fluid milk are assessed .15 per hundredweight of milk for commercial use. *Cochran,* at 266, fn. 1. The court held that the Dairy Act violated the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. *Id.* at 268. In reaching this conclusion, the court held that the generic advertising purchased with compelled assessments under the Dairy Act is private speech. *Id.* at 274. It reached this result in reliance on the Beef Act analysis contained in the *Frame* case which held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to them. *Id.* at 273-274. The court quoted from *Frame:* "the Secretary's extensive supervision . . . does not transform this self-help program for the beef industry into 'government speech'" and explained that "The Cattlemen's Board seems to be an entity 'representative of one segment of the population, with certain common interests'" and went on to point out that the members of the Beef Board and Operating Committee are all private individuals involved in the beef industry. *Id.* at 274 [internal citations

omitted]. Finding that the government's role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, the court held that the Secretary's supervisory responsibilities under the Dairy Program are not sufficient to transform the dairy industry's self-help program into government speech. *Id.*

In re Washington State Apple Advertising Comm'n, 257 F. Supp.2d 1290, 1296-1298 (E.D. Wash. 2003) held that the Washington State Apple Commission's promotional advertising funded by assessments imposed on each box of apples packed for the fresh market is not government speech.[5] The Court applied the *United Foods* analysis to the Washington apple industry and found that the Commission is not part of a comprehensive regulatory structure collectivizing the market. *Id.* at 1302.

II. COMPELLED GENERIC ADVERTISING UNDER THE BEEF ACT IS NOT A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

In *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001), the Court refused to consider whether or not the government's interest in compelled generic advertising under the Mushroom Promotion Research and Consumer Information Act, 7 U.S.C. §§6101 *et seq.*, could be

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[5] The Washington State Apple Commission's structure was created by an act of the state legislature. The Commission has been in existence since 1937 as a creature of state law and does not have the same similarities to the Beef Program that the Pork Program and the Mushroom Program do. In fact, neither the State of Washington nor any political subdivision has authority to edit, change, or censor the Commission's speech. *In re Washington State Apple Advertising Comm'n*, 257 F. Supp.2d 1290, 1294-1297 (E.D. Wash. 2003).

considered substantial for purposes of applying the test articulated in *Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) to analyze government imposed restrictions on commercial speech because the government did not rely upon *Central Hudson* to challenge the Court of Appeals decision in that case. *United Foods,* at 410.

Commercial speech is expression related solely to the economic interests of the speaker and its audience. *Central Hudson,* at 561. It not only serves the economic interests of the speaker, "but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-562. Commercial speech is accorded lesser protection under the Constitution than other constitutionally guaranteed expression. The protection available for particular commercial speech turns on the nature of the expression and of the governmental interests served by its regulation. *Id.* at 563.

The Beef Program's compelled assessments do not restrict the beef producers' speech at all, they compel private speech. Because the Program's assessments do not restrict speech, it is inappropriate to apply the *Central Hudson* test for restrictions on speech to analyze the First Amendment issue in this case. *In re Washington State Apple Advertising Comm'n,* 257 F. Supp.2d 1290, 1303 (E.D. Wash. 2003).

When a private party chooses to engage in commercial speech, i.e., advertising, the government is free to regulate it to prevent it from being false, deceptive, or misleading. This right to regulate includes a right to compel an advertiser to make certain disclosures to prevent its commercial speech from being false, deceptive or misleading. *Zauderer*

v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985). Such disclosure requirements must be reasonably related to the government's interest in preventing deception of consumers. *Id.* at 651.

The *Central Hudson* and *Zauderer* analyses are inapplicable to this case because there is no suggestion or evidence that the compelled generic advertising at issue is necessary to prevent voluntary advertising placed by the beef producers from being misleading. *United Foods,* at 416; *In re Washington State Apple Advertising Comm'n,* at 1303. Since no one claims that the beef producers are privately engaged in false, deceptive, or misleading advertising, the government has no right to compel the generic advertising in question to prevent consumer deception.

III. GENERIC ADVERTISING UNDER THE BEEF ACT CANNOT SURVIVE FIRST AMENDMENT SCRUTINY AS PART OF A BROAD REGULATORY SCHEME

Beef producers are not bound together and required to market their products as members of a large agricultural cooperative according to cooperative rules. There is nothing preventing individual beef producers and importers from making their own marketing decisions. Beyond the collection and disbursement of beef checkoff funds which are primarily used for advertising, there are no marketing orders that regulate how beef may be produced and sold. These crucial distinctions between the beef industry and the California fruit farmers described in *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457 (1997) compel a different outcome in this case.

In *Glickman,* California fruit farmers were subject to a series of agricultural orders promulgated by the USDA. *Id.* at 460. The orders exempted the fruit farmers from antitrust laws, collectivized fruit sales, set prices, set rules for marketing, and compelled fruit farmers to contribute to generic advertising. *Id.* at 469. In analyzing the constitutionality of the compelled contributions for generic advertising, the Court first reviewed the operation of the agricultural orders in their entirety and concluded that the orders reflected a policy of displacing unrestrained competition with government supervised cooperative marketing. *Id.* at 475. The Court decided that to avoid First Amendment scrutiny, an agricultural marketing program must compel speech that is: 1) unquestionably germane to the purposes of the marketing orders that collectivized the industry; and 2) non-ideological. *Id.* at 473. This analysis has been described as a determination that the compelled advertising assessments are a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords to other policy judgments made by Congress, rather than speech restrictions subject to First Amendment analysis. *In re Washington State Apple Advertising Comm'n,* 257 F. Supp.2d 1290, 1299 (E.D. Wash. 2003).

In contrast, the Court struck down compelled assessments for generic advertising imposed on mushroom handlers on First Amendment grounds in *United States v. United Foods, Inc.,* 533 U.S. 405, 411 (2001). The Court distinguished *Glickman* from the facts presented by the *United Foods* challenge to compelled assessments charged to promote generic advertising under the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§6101 *et seq.*, by reviewing the entire regulatory

program in order to resolve the case. The Court noted that in *Glickman,* the California tree fruits were marketed pursuant to detailed marketing orders that had displaced many aspects of independent business activity. *United Foods,* at 412. The tree fruit market in *Glickman* was described as "characterized by collective action rather than the aggregate consequences of independent competitive choices." *Id.* [internal citations omitted]. The *United Foods* opinion explained that the *Glickman* opinion and analysis "proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules." *Id.*

The Court distinguished the mushroom handlers in *United Foods* from the California tree fruit growers in *Glickman* as follows: "Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions." *Id.* As the mushroom growers were not required by statute to market their products according to cooperative rules as part of a valid scheme of economic regulation, the Court applied a First Amendment compelled speech analysis to strike down the assessment program. *Id.* at 410-411.

More than a quarter century ago, the Court held that commercial speech, usually defined as speech that proposes a commercial transaction, is entitled to First Amendment protection. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976). The *United Foods* opinion recognized the continuing vitality of this doctrine. *United Foods,* at 409.

The Court noted that it has not upheld compelled subsidies for speech in the context of programs where the principal object of the program is speech itself. *Id.* at 415.

The Court stated that it is only an overriding associational purpose independent from the speech itself which allows any compelled subsidy for speech in the first place and that such an overriding associational purpose did not exist in the case of the mushroom handlers. *Id.* at 413-416.

The following required associations have been found to have overriding associational purposes independent from speech which have been held sufficient to support some form of compelled speech: union shop arrangements, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); state-mandated integrated bar associations, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) and heavily regulated agricultural cooperatives, *Glickman, supra.* Even where the Court has upheld compelled speech subsidies imposed by government required associations, objecting members are not required to provide speech subsidies for matters not germane to the larger regulatory purposes which justified the required association. *United Foods,* at 414.

If no overriding associational purpose independent from speech exists to justify the required association of agricultural producers, then there is no basis on which to compel speech subsidies and they must be struck down as violative of the First Amendment. *Id.* at 415-416.

The district court in this case made the following findings which supported its ultimate conclusion that the beef checkoff is, in all material respects, identical to the mushroom checkoff:

1. The principal object of the beef checkoff program is the commercial speech itself;

2. Beef producers and sellers make all marketing decisions;

3. Beef is not marketed pursuant to some statutory scheme requiring an antitrust exemption;

4. The beef assessments are not germane to a larger regulatory purpose;

5. Beef producers and sellers are not regulated to the extent that the California tree fruit industry is.

LMA II at 1002.

Since no overriding associational purpose independent from speech exists to justify the required association of beef producers and importers, there is no basis on which to compel speech subsidies imposed by the beef checkoff program and they must be struck down as violative of the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CORINNE R. FINNERTY
Counsel of Record
Post Office Box 90
North Vernon, IN 47265
(812) 346-5201

LOREN D. REUTER
3750 State Road 135 North
Nashville, IN 47448
(812) 988-7571

Counsel for Amicus Curiae

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In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, *ET AL.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *ET AL.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF TEXAS, 32 OTHER STATES, AND PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

RANCE L. CRAFT
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*
[Additional counsel listed on inside cover]

TROY KING
Attorney General of Alabama

TERRY GODDARD
Attorney General of Arizona

MIKE BEEBE
Attorney General of Arkansas

KEN SALAZAR
Attorney General of Colorado

M. JANE BRADY
Attorney General of Delaware

CHARLES J. CRIST, JR.
Attorney General of Florida

THURBERT E. BAKER
Attorney General of Georgia

MARK J. BENNETT
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

LISA MADIGAN
Attorney General of Illinois

THOMAS J. MILLER
Attorney General of Iowa

GREGORY D. STUMBO
Attorney General of Kentucky

CHARLES C. FOTI, JR.
Attorney General of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MICHAEL A. COX
Attorney General of Michigan

JIM HOOD
Attorney General of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JON BRUNING
Attorney General of Nebraska

PATRICIA A. MADRID
Attorney General of New Mexico

WAYNE STENEHJEM
Attorney General of North Dakota

JIM PETRO
Attorney General of Ohio

W.A. DREW EDMONDSON
Attorney General of Oklahoma

HARDY MYERS
Attorney General of Oregon

GERALD J. PAPPERT
Attorney General of Pennsylvania

WILLIAM VÁZQUEZ IRIZARRY
Secretary of Justice
Commonwealth of Puerto Rico

HENRY McMASTER
Attorney General of South Carolina

PAUL G. SUMMERS
Attorney General of Tennessee

MARK L. SHURTLEFF
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

JERRY W. KILGORE
Attorney General of Virginia

CHRISTINE O. GREGOIRE
Attorney General of Washington

PEGGY A. LAUTENSCHLAGER
Attorney General of Wisconsin

PATRICK J. CRANK
Attorney General of Wyoming

QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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INTEREST OF *AMICI CURIAE*

The State *amici curiae* and the Commonwealth of Puerto Rico,[1] through their Attorneys General, respectfully submit this brief in support of Petitioners. Beef operations exist in every State, and beef production represents a substantial share of most States' agricultural output. Consistent with the States' significant economic stake in the beef industry, forty-five States have chosen to participate directly in the beef promotion, research, and information programs created by Congress in the Beef Act.

These States' beef councils spend approximately $25 million annually for state-level activities authorized by the Act, and they pool another $12 million annually for coordinated national programs. These projects not only support local businesses, but also provide a vehicle for the States to develop and convey health and safety information to their citizens. By invalidating the Beef Act and affirming a nationwide injunction against collection of the Beef Act assessments, the court of appeals has terminated many of these state programs. And those programs that would continue under state-law authority have lost the benefit of uniform national procedures and collective action under the Act's carefully crafted federal-state partnership.

In addition, the court of appeals's decision has ramifications for the States beyond the Beef Act. Congress has established similar federal-state cooperative programs for other products, and almost all States have created their own commodity-marketing programs. Moreover, the court of appeals's restrictive reading of the government-speech doctrine implicates the States' ability to convey any governmental message through private speakers or with funds other than general tax revenues.

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1. For convenience, this brief will refer to the *amici* States and Puerto Rico collectively as "the *amici* States."

SUMMARY OF ARGUMENT

All fifty States engage in beef production, which comprises the largest single segment of the American agricultural economy. Beef accounts for nearly one-fifth of total farm sales and over one million jobs. Congress, and *amici* States, therefore have a substantial interest in promoting the beef industry throughout the Nation.

The federal Beef Act and Beef Order embody a federal-state partnership to advance the American beef industry. The States' active participation in this regime reflects its success: forty-five States have established "qualified state beef councils" under authority of the Act to carry out the Act's beef-promotion efforts.

The state beef councils' direct role in implementing the Beef Act and Beef Order evinces a program of government speech.

In the wake of this Court's decisions in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), and *United States v. United Foods*, 533 U.S. 405 (2001), lower courts have struggled to assess various commodity promotion programs, often framing such challenges as a binary inquiry into whether the contested program more closely approximates the tree-fruit statute upheld in *Glickman*, or the Mushroom Act provisions struck down in *United Foods*.

In this case, beef is neither mushroom nor plum. Rather, promotion under the Beef Act is government speech, controlled and directed by the federal and state governments.

The state beef councils are constrained to deliver a promotional message defined by Congress. And the Secretary of Agriculture retains direct control over that message through her oversight of the councils' activities. Such governmental direction of the councils' message by itself confirms that promotional efforts under the Act are government speech. And in most States, the state beef councils

are themselves governmental entities carrying out the Beef Act's directives.

The Beef Act is but one example of the numerous decisions by Congress and the several States to establish commodity-marketing programs promoting agricultural industries. Such programs directly further the public interest.

Commodity-marketing programs respond to a particular public good problem inherent in many agricultural sectors. Advertising, as a general matter, stimulates consumer demand and helps produce an optimum amount of production and industry. Typically, however, agricultural products are not susceptible to producer-specific advertising; because there are many small and fragmented producers and because many agricultural products are seen as interchangeable commodities, generic advertising is often the only resort.

But generic advertising is by its nature non-excludable, that is, the benefits do not inhere to whichever producer funds the advertising. Thus, each individual producer lacks the economic incentive to fund generic advertising because he cannot capture all the benefit of his promotional efforts. Instead, each producer has an incentive to withhold his own funds and free ride on the generic advertising of others. And when each producer responds to those incentives, the result is sub-optimal in the aggregate: all are hurt by the failure of any one to promote their product.

Governments routinely step in to fill the void of such market failures, and to act in the public interest by providing the public good that would otherwise be under-produced. In the agricultural context, States have frequently chosen to legislate commodity-marketing programs funded by assessments on sales of the commodity. In so doing, the States engage in government speech because they direct the promotional message in a way that accommodates the States' interests to promote the public welfare.

That the mechanism for funding such programs has often been through commodity-specific fees does not render those programs impermissible under the First Amendment. If the States could engage in government speech funded by general revenue—as they surely could—then the fact that they have chosen instead to levy the principal costs of the program on those most directly benefitted by the government speech does not transform the program into one of compelled private speech.

The Beef Act establishes a system of federal-state cooperation to fund and dictate the terms of government speech promoting an industry important to the national interest. In the alternative, the Act can be characterized as a permissible regulation of commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). And it readily satisfies the *Central Hudson* test.

But the better view is that the Beef Act is not regulating private speech at all; rather, the Act creates a program of government speech, conveying a government message through government actors. And government speech—even funded by commodity-specific assessments on its principal beneficiaries—is entirely consistent with the First Amendment.

ARGUMENT

I. THE OPERATION OF THE BEEF ACT AT THE STATE LEVEL REFLECTS A PROGRAM OF GOVERNMENT SPEECH.

Petitioners correctly explain that the generic advertising authorized by the Beef Act constitutes government speech because Congress specified the message, created a governmental entity to disseminate it, and vested control of the message in a politically accountable official. The state beef councils' role in generating and disseminating generic advertising under the Beef Act bolsters this conclusion.

A. State Governments Have a Substantial Interest in Promoting the Beef Industry Through the Beef Act.

Before examining how the state beef councils' participation in Beef Act promotional activities evinces a program of government speech, it bears explaining why state governments are interested in promoting beef in the first instance, particularly through a coordinated federal-state program such as that created by the Act.

Beef production is the largest segment of the American agricultural economy, accounting for nearly one-fifth of total farm sales and over one million jobs. CHRISTA HARTSOOK, IOWA STATE UNIV., COMMODITY BEEF INDUSTRY PROFILE (June 2003). In 2002, the value of receipts from cattle and calves was approximately $38 billion. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., U.S. STATE FACT SHEET (2004). And on a global scale, the United States remains the world's largest producer of beef. *See World Beef Trade Overview*, LIVESTOCK & POULTRY: WORLD MARKETS & TRADE (Foreign Agric. Serv., U.S. Dep't of Agric., Washington, D.C.), Mar. 2004, at 10.

The beef industry plays an equally important role in the economies of the several States. All States engage in beef production, and the economic impact of the industry "contributes to nearly every county in the nation." DAN OTTO & JOHN D. LAWRENCE, ECONOMIC IMPACT OF THE UNITED STATES BEEF INDUSTRY 1 (2001). In forty States, cattle and calves are among the top five agricultural commodities in terms of gross receipts. *See* ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., STATE FACT SHEETS (2004). And in thirty-eight States, the annual value of those receipts exceeds $100 million. *See id.*[2] Thirty-one States have at

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2. In Texas alone, the annual value of these receipts approaches $6 billion. *See* ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., STATE FACT SHEETS (2004).

least 10,000 beef-cattle operations. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 2003, Table 7-22 (2003).

Congress confirmed the beef industry's economic significance to the Nation and the States when it enacted the Beef Research and Information Act of 1976. Pub. L. No. 94-294, 90 Stat. 529 (1976) (amended 1985). Specifically, Congress found that "maintenance and expansion of existing markets and the development of new or improved markets and uses [for beef] are vital to . . . the general economy of the Nation." *Id.*, §2. Congress further noted that "it is in the public interest to provide an adequate, steady supply of high quality beef and beef products readily available to the consumers of the Nation." *Id.* To this end, Congress declared that it was "essential" and "in the public interest" to establish procedures for developing "an effective and continuous coordinated program of research, consumer information, producer information, and promotion" and financing that program through an assessment, or "checkoff," on cattle sales. *Id.*

But this law also provided that any order implementing the assessment would first require approval of a two-thirds majority of beef producers voting in a national referendum. *Id.*, §9. The Secretary of Agriculture conducted such a referendum in 1977, but the order did not obtain the requisite super-majority. BEEF INDUS. COUNCIL ET AL., GROWTH OF A FORCE 26 (1988). In 1978, Congress amended the Act to require only a simple majority to approve the assessment order. Pub. L. No. 95-334, §302, 92 Stat. 433 (1978) (amended 1985). Pursuant to this amended procedure, the Secretary conducted a second referendum in February 1980, but, again, the assessment order was not approved by the producers. GROWTH OF A FORCE, *supra*, at 26.

When the second national referendum failed, States recognized that their interests in promoting beef were not being advanced. Accordingly, many States began to fill this breach by establishing

their own assessment-based beef-promotion programs or raising the assessment rate in their existing programs. *See id.*, at 27-29. By 1985, thirty-eight States had such programs in place. H.R. REP. NO. 99-271, pt. 1, at 187 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1291.[3] Most of these programs did not impose a mandatory assessment; rather, they either provided for voluntary payment of the assessment or allowed producers to obtain refunds after paying the assessment. In turn, these state-level programs voluntarily pooled some of their assessment funds through a national organization, the Beef Industry Council, in an effort to coordinate national promotion efforts. *See* H.R. REP. NO. 99-271, pt. 1, at 186.

These largely voluntary, state-based efforts did not generate sufficient revenue to adequately advance the federal and state governments' interests in promoting beef. *See* GROWTH OF A FORCE, *supra*, at 28-30. In 1985, in considering amendments to the 1976 Act, the House Committee on Agriculture reported that the "need for prompt action" to promote beef was "acute." H.R. REP. NO. 99-271, pt. 1, at 185. At that time, fed cattle prices had reached their lowest point in seven years,[4] and per capita consumption of beef had "dropped drastically." *Id.*

To address these concerns, Congress enacted the Beef Act in 1985 to amend and improve the 1976 law. In the Act, Congress reiterated its earlier findings that "production of beef and beef products plays a significant role in the Nation's economy" and that "maintenance and expansion of existing markets for beef and beef products are vital to . . . the general economy of the Nation." 7

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3. 28 States had established these programs by statute, whereas the rest were industry-created associations. GROWTH OF A FORCE, *supra*, at 30.

4. "Fed cattle" are raised for a certain period of time in feedlots to achieve a certain weight and yield certain grades of beef before being marketed for slaughter. Most beef sold at retail and in restaurants comes from fed cattle.

U.S.C. §2901(a)(2), (4). And Congress again declared that it was in the public interest to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. §2901(b).

Unlike the 1976 law, these projects would be funded through a mandatory assessment on cattle and beef sales. *Id.*, §2901(b). The new Act provided that the assessment order (Beef Order) would become effective within 120 days after issuance by the Secretary. *Id.*, §2903(b). Then, within twenty-two months after issuance of the Beef Order, the Secretary would conduct a producer referendum, with a majority vote required to continue the Order. *Id.*, §2906(a). In the 1988 referendum, nearly 80% of producers voted to continue the Order. GROWTH OF A FORCE, *supra*, at 33. Not only did the new program enjoy widespread producer support, but the impact on the government's ability to fund promotional efforts was immediate: in 1985, under the largely voluntary, state-based system, checkoff revenues totaled $18.6 million; from October 1986 through September 1987, the first year of the existing mandatory program, total checkoff revenues exceeded $70 million. *Id.*, at 30, 32.

Enactment of the Beef Act and retention of the Beef Order did not entirely displace the States' pre-1985 beef-promotion programs. Indeed, Congress acknowledged in the Act that state organizations already were conducting promotion, research, and information activities, which were "invaluable to the efforts of promoting the consumption of beef and beef products." *Id.*, §2901(a)(5). The Act incorporates these groups into its regulatory scheme by providing for certification of "qualified State beef councils," which are

authorized to carry out certain functions under the Act. *Id.*, §2902(14).[5]

Forty-five States have established qualified state beef councils under authority of the Beef Act,[6] Trial Tr. 228, confirming the States' substantial interest in continuing their efforts to promote the beef industry through this statute. And while many state beef councils would continue to function under state-law authority if the Beef Act were invalidated, *see infra* Part IV, the States favor maintaining the proven success of the federal-state partnership mandated by the Act, rather than returning to the comparatively ineffectual regime that preceded it.

B. The State Beef Councils' Role in Implementing the Beef Act Evinces a Program of Government Speech.

The status and function of the state beef councils in the Beef Act's promotional program supports Petitioners' position that the Act's generic advertising is government speech. The councils are constrained to deliver a message specified by Congress, a politically accountable official—the Secretary of Agriculture— exercises ultimate control over that message, and the councils function as governmental agencies in disseminating that message.

1. Congress and the Secretary specify the message conveyed by the state beef councils.

At the state level, qualified state beef councils may retain up to half of the checkoff assessments they collect to fund in-state promotion, research, and information programs authorized by the

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5. For example, the councils are charged with collecting the checkoff assessments on cattle sales that fund the projects authorized by the Act. 7 U.S.C. §2904(8)(A); 7 C.F.R. §1260.172.

6. Only Alaska, Connecticut, Massachusetts, New Hampshire, and Rhode Island have not established qualified state beef councils.

Act. 7 C.F.R. §1260.172; Trial Tr. 206-07, 316.[7] With respect to promotional messages, Congress has defined precisely the "promotion" that the state beef councils can convey: "advanc[ing] the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. §2902(13), (14).[8] These promotional activities must "take

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7. Some qualified state beef councils choose to retain less than half of the collected assessments for in-state projects, remitting the additional funds to support national projects. *See, e.g.*, IOWA BEEF INDUS. COUNCIL, ABOUT THE IOWA BEEF INDUSTRY COUNCIL 1 (2004) (noting that Iowa council retains 25% of collected assessments and contributes the remainder to national programs); KAN. BEEF COUNCIL, WHO WE ARE 1 (2004) (relating that the Kansas council retains 15% of collected assessments and contributes the remainder to national programs). Thus, while the state beef councils annually collect and control approximately $37 million in checkoff revenues, they spend $25 million on state-level programs and forward the remainder to be pooled and used to fund national programs. *See* Trial Tr. 229. This option permits States with relatively high volumes of beef production, but relatively few consumers, to maximize the return of their checkoff dollars. For example, the "Beef Belt" States—Colorado, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas—annually generate over 62% of Beef Act checkoff revenues, but are home to only 15% of the national population. *See* CATTLEMEN'S BEEF PROMOTION & RESEARCH BD., 2003 BEEF BD. ANNUAL REPORT 19 (2003); U.S. CENSUS BUREAU, POPULATION CHANGE & DISTRIBUTION 1990 TO 2000, at 2 (2001).

8. *See, e.g.*, ALA. CATTLEMEN'S ASSOC., ABOUT US 2 (2000) (explaining use of Alabama checkoff programs to increase consumer demand); GA. BEEF BD., ABOUT THE GEORGIA BEEF BOARD 1 (2004) (reporting use of assessments to develop foreign markets for Georgia beef); HAW. BEEF INDUS. COUNCIL, COLLECTION BROCHURE 2 (Mar. 1997) (describing use of assessments to produce a "Hawaii Beef/Cattle Industry" brochure and to sponsor promotional events at Hawaii farm fairs); IDAHO BEEF COUNCIL, ANNUAL REPORT OF ACTIVITIES 1 (2003) (noting use of

into account similarities and differences between certain beef, beef products, and veal," and "ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment." *Id.*, §2904(4)(B)(i)-(ii).

The Secretary has imposed additional limits on the councils' promotional activities in the Beef Order. 7 C.F.R. §1260.181(b).

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assessments to send media kits regarding the Idaho beef industry to Idaho media outlets); IND. BEEF COUNCIL, BEEF CHECKOFF 1 (2004) (describing use of checkoff funds for Indiana promotional activities); IOWA BEEF INDUS. COUNCIL, ABOUT THE IOWA BEEF INDUSTRY COUNCIL 1 (2004) (reporting use of assessments to develop foreign markets for Iowa beef); MINN. BEEF COUNCIL, MINNESOTA BEEF COUNCIL 1 (2004) (noting use of checkoff-funded programs "to strengthen the beef industry's market position in Minnesota"); MO. BEEF INDUS. COUNCIL, MBIC ANNUAL REPORT FY02 1-2 (2003) (describing sponsorship of print and radio advertising in Missouri and promotional events at Missouri supermarkets); NEB. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2004) (explaining checkoff funding of Nebraska television and radio advertisements and promotional events); OKLA. BEEF INDUS. COUNCIL, OKLAHOMA PRODUCERS HELP FUND NEW YORK PROMOTION (May 13, 2002) (describing Oklahoma council's use of assessments to assist New York council with beef promotion campaign in western New York); OR. BEEF COUNCIL, 2002-2003 ANNUAL REPORT 1 (2003) (explaining checkoff funding of Oregon radio advertising and promotional events); S.C. BEEF BD., MISSION STATEMENT (2004) (noting use of checkoff funds to increase demand for beef in South Carolina); S.D. BEEF INDUS. COUNCIL, BEEF INDUSTRY COUNCIL MATERIALS (2004) (listing checkoff-funded promotional materials published by South Dakota council); TENN. BEEF INDUS. COUNCIL, 2003 ANNUAL REPORT 1 (2004) (explaining checkoff funding of Tennessee television and internet advertisements and promotional events); VA. BEEF INDUS. COUNCIL, THE BEEF BUZZ 1 (2004) (describing retailer-incentive program to promote beef in Virginia); WIS. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2003) (detailing use of assessments to fund promotional activities at Wisconsin State Fair and advertising on Wisconsin radio stations).

For example, the councils' advertising is subject to the same constraints imposed on national projects, *id.*, §1260.181(b)(1), which prohibit "reference to a brand or trade name of any beef product . . . without the approval of the Board and the Secretary," *id.*, §1260.169(d). The councils also may not use checkoff funds under the Act for a message that aims to "influenc[e] governmental policy or action" or uses "any unfair or deceptive acts or practices," including any message that would disparage a competing product (*e.g.*, a particular brand of beef or other foods such as poultry and fish). *Id.*, §1260.181(b)(7); *see also* Trial Tr. 269-70, 273.

Beyond these statutory and regulatory directives, the Secretary may instruct the state beef councils to communicate a specific message within the scope of the Act and Order. For example, the Secretary has used the state beef councils to implement an initiative aimed at minority farmers. Trial Tr. 295-96.

In sum, when the state beef councils engage in activities funded through the Beef Act, they are not espousing their own views. Rather, they are communicating a message carefully determined by the federal government. That Congress and the Secretary dictate the content of the state beef councils' activities in this manner indicates that the message being delivered is government speech. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (holding that school invocation was government speech subject to Establishment Clause restrictions because school regulations "confine the content and topic of the student's message"); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (indicating that state-established program to advance the State's own message would be government speech).

2. The Secretary exercises control over the message conveyed by the state beef councils.

Not only have Congress and the Secretary defined the message the state beef councils can convey, but the Secretary also exercises

ongoing control over the formulation and dissemination of that message. The Secretary appoints all members of the Beef Board, 7 U.S.C. §2904(1), which in turn certifies beef-promotion entities as qualified state beef councils, thereby enabling them to engage in advertising under the Act, 7 C.F.R. §1260.181(a). Through the Beef Board, the Secretary also may require the state beef councils to furnish reports and information about their activities. *See id.*, §1260.181(b)(6). If an audit reveals that a state beef council has improperly used checkoff funds for a message outside the scope of the Beef Act and Beef Order, the Beef Board can seek restitution from the council and the Secretary must approve any settlement of the issue. Trial Tr. 271, 316. In addition, the Secretary can terminate a state program's status as a qualified state beef council if it does not comply with the Act and Order. Trial Tr. 316; *see also* CATTLEMEN'S BEEF PROMOTION & RESEARCH BD., GUIDELINES FOR THE APPROVAL OF PROGRAMS UNDER THE BEEF PROMOTION AND RESEARCH ACT 2 (1990).

And in practice, the Secretary exercises additional control over the message conveyed by the state beef councils through the Department of Agriculture's Agricultural Marketing Service. At the state beef councils' request, the Service will informally review proposed advertising projects and advise whether they would ultimately be approved as permissible manifestations of the message authorized by the Beef Act and Beef Order. Trial Tr. 294-95. In these circumstances, the Service can effectively prevent the state beef councils' development of any message that the Secretary would eventually disallow as outside the scope of the Act. Trial Tr. 295; *see also Charter v. United States Dep't of Agric.*, 230 F.Supp.2d 1121, 1125 (D. Mont. 2002) (observing that "any checkoff-funded project developed by a Qualified State Beef Council must meet USDA approval"), *appeal filed*, No. 02-36140 (CA9 Dec. 24, 2002). Such control is characteristic of government speech. *See Southworth*, 529 U.S., at 229 (indicating that ongoing

government responsibility for message content suggests government speech).

3. The state beef councils function as governmental entities in conveying the message dictated by Congress and the Secretary.

The fact that Congress and the Secretary have specified the message to be conveyed under the Beef Act, and that the Secretary retains ongoing control over the message, establishes that the generic advertising conducted by the state beef councils is government speech. Whether the state beef councils are deemed governmental agencies or private associations is ultimately irrelevant because the Court has made clear that Congress can employ private entities to convey the government's message. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991). That said, the state beef councils function more like governmental agencies than private entities in carrying out the promotional programs authorized by the Beef Act, further illustrating that these activities constitute government speech.

The majority of the qualified state beef councils are either created or certified by state legislatures to carry out specified governmental objectives, including promotional activities, research, and the dissemination of producer and consumer information authorized by the Beef Act.[9] Indeed, some are explicitly described

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9. *See, e.g.*, ALA. CODE §2-8-4; ARIZ. REV. STAT. §3-1232; ARK. CODE ANN. §2-35-303; CAL. FOOD & AGRIC. CODE §64591; COLO. REV. STAT. §35-57-104(1); DEL. CODE ANN. tit. 3, §704(a); FLA. STAT. ANN. §573.112; GA. CODE ANN. §2-8-92; IDAHO CODE §25-2901; 505 ILL. COMP. STAT. 25/4; IND. CODE §15-4-3.5-3; IOWA CODE §181.3; KY. REV. STAT. ANN. §247.630; LA. REV. STAT. ANN. §3:555.4; MICH. COMP. LAWS §287.603; MINN. STAT. §17.54; MO. REV. STAT. §275.320; MONT.

as state agencies or political subdivisions under state law.[10] And all state beef councils effectively enjoy the status of a state agency: in dictating that there can be only one qualified beef council in each State, Congress ensured that each council has exclusive jurisdiction over its functions in its own State, just as a state agency would. 7 U.S.C. §2904(8)(C).

And like state agencies, the qualified state beef councils are constrained by their enabling legislation—here, the Beef Act. A state beef council is not authorized to conduct promotional activities under the Beef Act until the Secretary certifies the council as a "qualified State beef council" as defined by the Beef Act and

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CODE ANN. §80-11-510; N.J. STAT. ANN §4:10-52; N.M. STAT. ANN. §77-2A-3; N.Y. AGRIC. & MKTS. LAW §294(9); N.D. CENT. CODE §4-34-03; OHIO REV. CODE ANN. §924.07; OR. REV. STAT. §577.210; 3 PA. CONS. STAT. §4504; S.C. CODE ANN. §46-17-190; TENN. CODE ANN. §43-29-118; TEX. AGRIC. CODE §41.051; VA. CODE ANN. §3.1-796.15; WASH. REV. CODE §16.67.040; WIS. STAT. §96.10; WYO. STAT. ANN. §11-37-103.

10. *See, e.g.*, ARIZ. REV. STAT. §3-1232(D) (referring to Arizona council members as "state officers"); COLO. REV. STAT. §35-57-104(1) (creating Colorado council as "a political subdivision of the state"); GA. CODE ANN. §2-8-94 (stating that Georgia Agricultural Commodity Commission for Beef is an "instrumentality of the state"); LA. REV. STAT. ANN. §3:555.4(A) (referring to Louisiana council as agency within the State Department of Agriculture); MICH. COMP. LAWS §287.603 (creating Michigan council within the State Department of Agriculture); TEX. AGRIC. CODE §41.052 (providing that a state commodity marketing board is a "state agency" and "governmental unit" for certain purposes); VA. CODE ANN. §3.1-796.15 (describing Virginia council as an entity within the State Department of Agriculture); WASH. REV. CODE §16.67.095 (decreeing that Washington council "speak[s] on behalf of Washington state government"); WYO. STAT. ANN. §11-37-103 (declaring that Wyoming council is an entity within the State Department of Agriculture).

Beef Order. 7 U.S.C. §2902(14); 7 C.F.R. §1260.181. If a council uses checkoff funds for activities outside the scope of the Act and Order, the Secretary can terminate the council's status as a "qualified State beef council," Trial Tr. 316, regardless of its continuing existence under state law. For these reasons, the qualified state beef councils operate as governmental entities when they engage in advertising activities authorized by the Act, conveying a message of government speech. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that Amtrak is a governmental entity for First Amendment purposes because Congress created it to serve a governmental purpose and appointed a majority of its directors).

II. COMMODITY-MARKETING PROGRAMS SUCH AS THE BEEF ACT ARE A PERMISSIBLE FORM OF GOVERNMENT SPEECH EXERCISED BY THE STATES.

The Beef Act exemplifies a common form of government speech exercised by the States: commodity-marketing programs to promote the agricultural sector of state economies. The States' widespread use of these programs stems from unique attributes of agricultural economics that warrant governmental intervention as a speaker. Nevertheless, Respondents propose limitations that would exclude such programs from the ambit of government speech. These limits find no basis in the Court's precedents and impose unreasonable constraints on state government.

A. State Governments Frequently Employ Commodity-Marketing Programs to Address a Public-Good Problem.

Almost all States have created their own agriculture commodity-marketing programs by statute. *See* Appendix. While these programs may vary in structure and function from the Beef Act, *see infra* Part IV, they generally operate according to a common model: they levy assessments on agricultural commodities to fund activities—including advertising, research, and

informational programs—that promote or enhance the commodity as a consumer good.

States have legislated these programs to address a problem inherent in many agricultural industries. When a particular commodity is relatively homogenous, an individual producer cannot capture all of the benefit created by its efforts to market that commodity; rather, that benefit will "spill over" and be shared by other producers of the commodity that did not share the marketing cost. This problem is magnified when there are many relatively small producers, as is frequently the case in agriculture.[11] The benefits of the marketing are spread among so many firms that the benefit received by any firm supplying the marketing will likely be less than the costs incurred to generate it. Indeed, the smallest producers may lack the resources to engage in any meaningful advertising. Under these circumstances, the rational individual producer has an incentive not to undertake the advertising at all, but instead to "free ride" on the efforts of firms that do advertise. Because each producer faces similar incentives, a sub-optimal amount of advertising is generated, and the industry—and, therefore, the state economy— suffers. *See* Hoy F. Carman et al., *Marketing California's Agriculture Production, in* CALIFORNIA AGRICULTURE: DIMENSIONS AND ISSUES 113-14 & n.5 (Jerry Siebert ed., 2004); John M. Crespi, *The Generic Advertising Controversy: How Did We Get Here and Where are We Going?*, 25 REV. AGRIC. ECON. 295-96 (2003).

This market failure presents a "public-good problem" where government intervention can rectify the situation. Classic examples of such public goods include roads and parks. Because a private

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11. For example, approximately 80% of the 831,000 beef cowherds in the United States have less than fifty head of cattle. DAN OTTO & JOHN D. LAWRENCE, ECONOMIC IMPACT OF THE UNITED STATES BEEF INDUSTRY 1 (2001).

actor cannot effectively exclude others from using these facilities or recapture his costs in constructing them, he lacks the necessary incentive to provide them in the first instance. The government can address this problem by raising funds from the citizenry, or a portion thereof, and thereby provide the public good. In this case, the public good happens to be a form of speech, namely generic advertising. *See United States v. United Foods, Inc.*, 533 U.S. 405, 421 (2001) (Breyer, J., dissenting) ("[C]ollective promotion and research is a perfectly traditional form of government intervention in the marketplace.").

In game-theoretic terms, each individual producer faces a classic "prisoner's dilemma" with respect to generic advertising. All producers are best off, and the public good is maximized, if robust advertising is provided. All producers are worst off, and the public good is diminished, if there is little to no generic advertising. But, each producer's individual profit-maximizing course is (1) to spend no money himself on advertising, and (2) to reap the benefits of robust generic advertising by others. Accordingly, following the rational incentives of each individual producer—absent credible collective action (here, provided by the Beef Act)—all producers end up at the least optimal outcome, and the public good is diminished.

Addressing such market failures is a classic government function. But in providing the public good of commodity marketing, States do not simply facilitate private advertising that individual producers would otherwise lack the incentive to create. Rather, they engage in government speech because they direct and control the message in a way that not only promotes the commodity, but does so in a manner consistent with the States' general policy concerns. *See Southworth*, 529 U.S., at 229. The restrictions on promotional activities under the Beef Act highlight this distinction. For example, state beef councils may not use checkoff funds for a message that uses "any unfair or deceptive acts or practices," 7 C.F.R. §1260.181(b)(7), because the government has an interest in

protecting consumers at the same time it is promoting the beef industry. Likewise, state beef councils cannot promote a message that disparages a competing product, such as poultry, Trial Tr. 269-70, 273, because the government—in contrast to the beef industry—has an interest in the success of competing agricultural sectors. Thus, while the government's and industry's interests largely coincide, these programs communicate the government's viewpoint; as such, the message delivered is government speech.

B. Limitations That Exclude Commodity-Marketing Programs from the Definition of Government Speech Have No Legal Basis and Impose Unreasonable Constraints on State Government.

In the face of this widespread use of commodity-marketing programs by States, Respondents and others have proposed limits on the government-speech doctrine that would exclude these programs from its reach. They claim that programs such as the Beef Act do not qualify as government speech because (1) the government funds them from a targeted assessment rather than general tax revenues, Br. in Opp. 18-19, 24, and (2) the advertising originates from the assessed producers—*i.e.*, it is private actors, and not government employees, who compose the message actually delivered, Br. in Opp. 20.[12]

Requiring state governments to fund their speech only out of general tax revenues, rather than targeted assessments, is an artificial distinction that does not address Respondents' principal complaint. Even if the government funded commodity-marketing programs out of the general fisc, some of those revenues invariably

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12. *See also United States v. United Foods, Inc.*, No. 00-276, Oral Argument Tr. 33, ll. 8-14 (Apr. 17, 2001) (counsel for United Foods) (suggesting that exacting government prescription of the message, as in the Surgeon General's warning that appears on cigarette packages, is a necessary characteristic of government speech).

would be drawn from persons who disagree with the government's message. *See Buckley v. Valeo*, 424 U.S. 1, 92 (1976) (observing that "every appropriation made by Congress uses public money in a manner to which some taxpayers object"). The Court has required only that government speech be paid for with funds "raised by the government." *Southworth*, 529 U.S., at 229. It has never dictated from whom those funds must be exacted.

Moreover, imposing this limitation on commodity-marketing programs and other forms of government speech cannot be squared with the normal functioning of state government. As previously discussed, generic commodity marketing is a public good provided by the State, like roads and parks. *See supra* Part II.A. In turn, the State may rationally conclude that it should fund that public good by assessing the segment of the citizenry that stands to reap the greatest benefit—that is, the State can fund commodity marketing by assessing the producers of that commodity, just as it can fund roads by charging drivers a toll, fund parks by charging visitors entrance fees, and fund public lands by charging ranchers grazing fees.

Indeed, facing "substantial budget deficits" and "[w]idespread opposition to tax increases" over the last four years, States have increasingly resorted to such "user fees" to fund public services consistent with the public's mandate. *See* John M. Broder, *Despite Signs of Economic Recovery, States' Budgets Are Still Reeling*, N.Y. TIMES, Jan. 5, 2004, at A12.[13] This revenue mechanism is no

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13. For fiscal years 2002-2004, 34 States enacted user-fee increases to address budget shortfalls. *See* NAT'L GOVERNORS ASS'N ET AL., THE FISCAL SURVEY OF STATES: DECEMBER 2003, at 12; NAT'L GOVERNORS ASS'N ET AL., THE FISCAL SURVEY OF STATES: NOVEMBER 2002, at 11; NAT'L GOVERNORS ASS'N ET AL., THE FISCAL SURVEY OF STATES: DECEMBER 2001, at 11.

less legitimate when the public service involves government speech.

The contention that government speech must strictly be created by the government itself is likewise unfounded. In *Rust*, for example, the Department of Health and Human Services did not provide Title X physicians with a script to read in counseling their patients. Rather, the challenged regulations contained broad directives that generally defined the contours, but not the precise language, of the government's message. 500 U.S., at 179-80. Within those contours, the doctors could compose and deliver the counseling message in their own words.[14] Developing the government's message in this manner did not transform that message from government speech to private speech. *Cf. Santa Fe Indep. Sch. Dist.*, 530 U.S., at 303 (holding that student invocation at school event was government speech for Establishment Clause purposes where school regulations "confine [its] content and topic" even though students actually draft its language).

In any event, limiting government speech to messages specifically scripted by legislators or other public officials ignores the realities of state government. No State has a creative monopoly on the manner in which it can best accomplish its objectives—including the communication of a governmental message. Budgetary and structural constraints may also limit States' abilities to produce messages using only government employees and resources. Outsourcing the development of specific advertising programs within the scope of a general legislative directive may often be the most efficient and effective means of generating and conveying the State's message. But because the State authorizes

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14. The regulations provided "examples" of how the government's message could be communicated in the context of a doctor-patient conference, 42 C.F.R. §59.8(b) (1989), but did not dictate that the message be conveyed using certain language.

the program and controls the general message, the result remains government speech. *Southworth*, 529 U.S., at 229.[15]

III. THE BEEF ACT IS A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH UNDER THE *CENTRAL HUDSON* TEST.

The *amici* States agree with Petitioners that, even if the Court concludes that generic advertising under the Beef Act is not government speech, the Act's advertising provisions are nevertheless a permissible regulation of commercial speech under the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The States' experiences under the Act and its predecessor confirm that the current regulatory scheme promotes a "substantial" governmental interest, "directly advances" that interest, and is "not more extensive than is necessary to serve that interest." *See id.*, at 566.

As discussed previously, the States share the substantial governmental interests expressly articulated by Congress in the Beef Act. *See supra* Part I.A; 7 U.S.C. §2901. Apart from the statistical evidence of the beef industry's impact on state economies, the fact that ninety percent of the States participate in

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15. State outsourcing of "message composition" is by no means limited to commodity-marketing programs. *See, e.g.*, KY. REV. STAT. ANN. §117.900 (establishing statewide student contest for slogan relating to voter registration); N.Y. ECON. DEV. LAW §§160-68 ("New York State Tourist Promotion Act") (providing state matching funds for firms that develop approved advertising for state tourism within "central conceptual themes" determined by the State); KAISER COMM'N ON MEDICAID & THE UNINSURED, MARKETING MEDICAID & CHIP: A STUDY OF STATE ADVERTISING CAMPAIGNS iii (Oct. 2000) (noting that several States use outside marketing firms to design and run advertising campaigns to raise awareness of, and enrollment in, their State Child Health Insurance Programs and Medicaid programs).

Beef Act programs through their state beef councils demonstrates the States' significant stake in the industry. *See supra* Part I.A.

The Beef Act and Beef Order also directly advance the States' interests by allowing them to control a portion of the assessments to conduct state-level promotion activities. These promotion efforts stimulate demand for beef, supporting that sector of the States' economies. *See* Ronald W. Ward & Chuck Lambert, *Generic Promotion of Beef: Measuring the Impact of the U.S. Beef Checkoff*, 44 J. AGRIC. ECON. 456, 464 (1993) (describing nearly six-fold returns on checkoff dollars); *see also Central Hudson*, 447 U.S., at 569 (noting connection between advertising and demand). And as discussed previously, the mandatory assessment advances the States' interest in preventing the "free-rider problem" and the resulting sub-optimal level of commodity advertising. *See supra* Part II.A.

Finally, the Beef Act and Beef Order are no more extensive than necessary to serve the government's interests. The history of the Beef Act demonstrates the compelling need for mandatory assessments. As discussed previously, earlier incarnations of the beef checkoff program at the federal and state level based on voluntary assessments failed to advance adequately the government's interests in promoting beef. *See supra* Part I.A. Only after institution of the current mandatory checkoff in a coordinated federal-state program did States realize a substantial return for their beef promotion efforts. *See* Ward & Lambert, *supra*, at 464; *see also United Foods*, 533 U.S., at 430 (Breyer, J., dissenting) (observing that "compelled contributions may be necessary to maintain a collective advertising program in that rational producers would otherwise take a free ride on the expenditures of others"). At the same time, objecting producers are not without recourse under the Act: they may nominate like-minded producers to serve on the Beef Board to voice their concerns, 7 U.S.C. §2904(1), and they may seek a referendum to terminate the checkoff program altogether, 7 U.S.C. §2906(b). They are also free to generate and

disseminate a competing message using non-checkoff funds. In this manner, the Beef Act reasonably accommodates the potentially divergent interests of affected producers while still effectively achieving the government's substantial interest in promoting beef. *See In re R.M.J.*, 455 U.S. 191, 203 (1982) (holding that, under the *Central Hudson* test, the government's "interference with speech must be in proportion to the interest served").

IV. IF THE COURT AFFIRMS THE JUDGMENT, IT SHOULD SPECIFY THAT ITS HOLDING IS LIMITED TO THE PARTICULAR STRUCTURE AND FUNCTION OF THE BEEF ACT.

The *amici* States believe that the Beef Act is entirely constitutional. If the Court rejects Petitioners' arguments and holds that the Beef Act unconstitutionally compels Respondents' funding of generic advertising, many state beef marketing programs will nevertheless continue under authority of state law. *See supra* n.9; *see also* Appendix. Some States enacted these programs prior to the current Beef Act and have held them in abeyance while the federal program is in place.[16] Other States have retained their

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16. *See, e.g.*, ARK. CODE ANN. §2-35-304(d) ("If the federal Beef Promotion and Research Act of 1985 and the administrative orders and rules adopted under it are discontinued for any reason, the assessment of twenty-five cents (25¢) per head of cattle sold in this state shall be reactivated the same as if the national program had never existed . . . ."); IOWA CODE §181.7A ("The council shall suspend the state assessment upon collection of the federal assessment."); KY. REV. STAT. ANN. §247.652(3) ("In the event the one dollar ($1) assessment provided by the federal act is terminated or suspended, the assessment on each Kentucky producer of a bovine animal shall continue . . . ."); MO. REV. STAT. §275.352 ("If a national referendum among beef producers passes and a federal assessment on beef producers is adopted pursuant to federal law, no state fees shall be collected under the provisions of this chapter, in excess of a commensurate amount credited against the obligation to pay any such federal assessment.")

authority for state programs concurrent with the Beef Act program.[17] Still others have enacted new beef-checkoff programs that will activate if the Beef Act is repealed or permanently enjoined.[18] These programs may vary in structure and operation from the Beef Act, but any such variances are not before the Court in this case. Therefore, the *amici* States submit that their state programs may still qualify as government speech, a constitutional regulation of commercial speech, or part of a permissible "broad regulatory scheme" under *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), even if the Beef Act is struck.

For example, many state programs contain a mechanism for refunding assessments to objecting producers.[19] As such, these

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17. *See, e.g.*, 505 ILL. COMP. STAT. 25/9 (authorizing collection of federal and state assessments); LA. REV. STAT. ANN. §3:555.8 (same); N.D. CENT. CODE §4-34-08 (authorizing collection of federal *or* state assessment, whichever is greater); OR. REV. STAT. §577.512 (authorizing collection of federal and state assessments); WASH. REV. CODE §§16.67.120-.122 (same).

18. *See, e.g.*, 2004 Fla. Laws ch. 2004-65, §2 (providing that the Florida checkoff program cannot take effect until the stay of the injunction in this case is lifted or the Beef Act and Beef Order are otherwise repealed); 2004 Ga. Laws Act 728, §3-1(b) (providing that Georgia checkoff program will not become effective and will self-repeal unless the Court affirms the judgment in this case); TEX. AGRIC. CODE §41.162 (2003 law authorizing referendum on state assessment program).

19. ALA. CODE §2-8-15; ARK CODE ANN. §2-35-310; COLO. REV. STAT. §35-57-119; FLA. STAT. ANN. §570.9135(11); GA. CODE ANN. §2-8-104(b)(3); 505 ILL. COMP. STAT. 25/10; IOWA CODE §181.12; KY. REV. STAT. ANN. §247.675; LA. REV. STAT. ANN. §3:555.9; MINN. STAT. §17.63; MO. REV. STAT. §275.360; N.M. STAT. §77-2A-7.3; N.C. GEN. STAT. §106-567; N.D. CENT. CODE §4-34-11; OHIO REV. CODE §924.09; S.C. CODE ANN. §46-17-360; TENN. CODE ANN. §43-29-111; TEX. AGRIC. CODE §41.083; UTAH CODE ANN. §4-21-4.

programs do not irrevocably compel the funding of advertising in the manner of the Beef Act. Whether these refund provisions rectify any compelled-speech problem under the First Amendment could depend on, *inter alia*, the risk that such funds would be used for impermissible purposes (and it is well-established that checkoff assessments are used for a variety of unobjectionable activities, such as research[20] and consumer and producer information[21]), and

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20. *See, e.g.*, IDAHO BEEF COUNCIL, ANNUAL REPORT OF ACTIVITIES 2 (2003) (describing checkoff funding of research at the University of Idaho regarding cattle diseases and the anti-carcinogenic effects of conjugated linoleic acid, a substance naturally occurring in beef); ILL. BEEF ASSOC., ILLINOIS BEEF QUALITY INITIATIVE 1 (2004) (explaining checkoff-funded data collection program to assist in cattle health management); MO. BEEF INDUS. COUNCIL, MBIC ANNUAL REPORT FY02 (2003) (describing support of research projects at University of Missouri-Columbia relating to beef pathogen detection and control); NEB. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2004) (noting funding of *E. coli* research at University of Nebraska-Lincoln); OR. BEEF COUNCIL, 2002-2003 ANNUAL REPORT 1-2 (2003) (describing checkoff-funding of marketing study).

21. *See, e.g.*, ALA. CATTLEMEN'S ASSOC., ABOUT US 4 (2000) (noting efforts responding to inquiries about drought and food-safety concerns); CAL. BEEF COUNCIL, STATEMENT REGARDING BSE CASE IN WASHINGTON STATE (Dec. 29, 2003); IDAHO BEEF COUNCIL, ANNUAL REPORT OF ACTIVITIES 1 (2003) (explaining role in responding to reports of BSE in Canada); ME. BEEF INDUS. COUNCIL, JANUARY UPDATE & INFORMATION 2 (Jan. 26, 2004) (relating efforts responding to inquiries about BSE); MO. BEEF INDUS. COUNCIL, MBIC ANNUAL REPORT FY02 3 (2003) (noting work with Missouri organizations and agencies to develop an animal disease emergency response plan); NEB. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2004) (detailing participation in conference on obesity and cardiovascular disease); *Oklahoma Checkoff Responds to BSE*, DOLLARS & SENSE (Okla. Beef Council, Oklahoma City, Okla.), Jan. 2004, at 1(listing efforts responding to inquiries about BSE); OR. BEEF COUNCIL, 2002-2003 ANNUAL REPORT 1-2 (2003)

the expediency and impartiality of the refund procedure. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 304-09 (1986). These factors and others would have to be evaluated in the context of a particular program.

For this reason, if the Court concludes the Beef Act is unconstitutional, the *amici* States urge the Court to expressly limit its holding to the terms of the Beef Act itself.

CONCLUSION

The Court should reverse the judgment of the Eighth Circuit Court of Appeals.

(describing participation in seminar on irradiated beef and communications regarding nutrition, BSE, and other consumer issues); *State Partners Respond: BSE in America*, TENNESSEE BEEF INDUSTRY UPDATE (Tenn. Beef Indus. Council, Franklin, Tenn.), Feb. 2004, at 1-2 (noting efforts responding to BSE inquiries); TEX. BEEF COUNCIL, THE FACTS ON FOOD SAFETY 1 (2004) (providing consumer information regarding safe storage and preparation of beef); WIS. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2003) (detailing communications with producers regarding quality control issues at beef industry conventions and with health professionals regarding nutrition issues).

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General, Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

RANCE L. CRAFT
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

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APPENDIX
STATE COMMODITY-MARKETING PROGRAMS

Commodity	State Legislated Programs
General	CAL. FOOD & AGRIC. CODE §§58601-59293; COLO. REV. STAT. §§35-28-102 to -123; DEL. CODE ANN. tit. 3, §§702-717; FLA. STAT. ANN. §§573.101-.124; GA. CODE ANN. §§2-8-1 to -79; IND. CODE §§15-4-3.5-1 to -10; LA. REV. STAT. ANN. §§3:552.1-.26; ME. REV. STAT. ANN. tit. 7, §§401-403; MD. CODE ANN., AGRIC. §§10-101 to -116; MICH. COMP. LAWS §§290.651-.674; MINN. STAT. §§17.50-.69; MISS. CODE ANN. §§69-45-1 to -15; MO. REV. STAT. §§275.300-.370; MONT. CODE ANN. §§80-11-501 to -519; NEB. REV. STAT. §§2-3801 to -3812; N.J. STAT. ANN. §§4:10-43 to -75; N.Y. AGRIC. & MKTS. LAW §§292-295; N.C. GEN. STAT. §§106-550 to -568; OHIO REV. CODE ANN. §§924.01-.99; 3 PA. CONS. STAT. §§4501-4513; S.C. CODE ANN. §§46-17-10 to -470; TENN. CODE ANN. §§43-29-101 to -120; TEX. AGRIC. CODE §§41.001-.127; VT. STAT. ANN. tit. 6, §§2961-2965; WASH. REV. CODE §§15.65.010-.910; WIS. STAT. §96.01-.20
Alfalfa/ alfalfa seed	IDAHO CODE §§22-4201 to -4218; NEV. REV. STAT. §§587.131-.185; MONT. CODE ANN. §§80-11-301 to -313; OR. REV. STAT. §576.062(9)
Apples	CAL. FOOD & AGRIC. CODE §§75501-75656; IDAHO CODE §§22-3601 to -3616; MASS. GEN. LAWS ch. 128, §§102-115; N.H. REV. STAT. ANN. §§434:33-:40; VA. CODE ANN. §§3.1-618 to -636; WASH. REV. CODE §§15.24.010-.920
Aquaculture	MO. REV. STAT. §§275.450-.455

Asparagus	CAL. FOOD & AGRIC. CODE §§78201-78305
Avocados	CAL. FOOD & AGRIC. CODE §§67001-67143
Barley	IDAHO CODE §§22-4001 to -4019; MONT. CODE ANN. §§80-11-201 to -224; N.D. CENT. CODE §§4-10.4-01 to -14
Beans	IDAHO CODE §§22-2911 to -2923; MICH. COMP. LAWS §§290.551-.568; NEB. REV. STAT. §§2-3735 to -3765; N.D. CENT. CODE §§4-10.3-01 to -13
Beef/cattle	ALA. CODE §§2-8-1 to -22; ARIZ. REV. STAT. §§3-1231 to -1239; ARK. CODE ANN. §§2-35-401 to -407; CAL. FOOD & AGRIC. CODE §§64501-64736; COLO. REV. STAT. §§35-57-101 to -120; IDAHO CODE §§25-2901 to -2912; 505 ILL. COMP. STAT. 25/1-25/16; IOWA CODE §§181.1-.20; KY. REV. STAT. ANN. §§247.610-.685; LA. REV. STAT. ANN. §§3:555.1-.13; MICH. COMP. LAWS §§287.601-.610; N.M. STAT. ANN. §§77-2A-1 to -9; N.D. CENT. CODE §§4-34-01 to -14; OR. REV. STAT. §§577.110-.990; TEX. AGRIC. CODE §§41.151-.164; UTAH CODE ANN. §§4-21-1 to -5; VA. CODE ANN. §§3.1-796.13 to -796.28; WASH. REV. CODE §§16.67.010-.920; WYO. STAT. ANN. §§11-37-101 to -110
Blackberries/ raspberries	OR. REV. STAT. §576.062(20)
Blueberries	OR. REV. STAT. §576.062(11)
Catfish	ALA. CODE §§2-8-270 to -291
Cherries	IDAHO CODE §§22-3701 to -3716; OR. REV. STAT. §576.062(23)

Citrus fruits	FLA. STAT. ANN. §§601.01-.992
Corn	505 ILL. COMP. STAT. 40/1-40/23; IND. CODE §§15-4-10-1 to -31; KY. REV. STAT. ANN. §§247.6001-.6035; NEB. REV. STAT. §§2-3601 to -3635; N.D. CENT. CODE §§4-10.6-01 to -16; S.D. CODIFIED LAWS §§38-32-1 to -24; VA. CODE ANN. §§3.1-1031 to -1049
Cotton	ALA. CODE §§ 2-8-190 to -211; VA. CODE ANN. §§3.1-1081 to -1103
Crawfish	LA. REV. STAT. ANN. §§3:556.1-.13
Dairy/milk	ALA. CODE §§2-13-110 to -125; CAL. FOOD & AGRIC. CODE §§64001-64322; IDAHO CODE §§25-3101 to -3123; 505 ILL. COMP. STAT. 95/1-95/21; KY. REV. STAT. ANN. §§247.450-.505, 247.4451-.4483; LA. REV. STAT. ANN. §§3:557.1-.12; ME. REV. STAT. ANN. tit. 7, §§2991-2994; MISS. CODE ANN. §§69-35-1 to -33; NEB. REV. STAT. §§2-3948 to -3964; NEV. REV. STAT. §§584.031-.093, 584.325-.419; N.C. GEN. STAT. §§106-266.6 to -266.21; N.D. CENT. CODE §§4-27-01 to -12; OR. REV. STAT. §576.062(1); UTAH CODE ANN. §§4-22-1 to -10; VA. CODE ANN. §§3.1-425 to -461; VT. STAT. ANN. tit. 6, §§2971-2989; WASH. REV. CODE §§15.44.010-.910; WYO. STAT. ANN. §§11-36-101 to -110
Dates	CAL. FOOD & AGRIC. CODE §§77701-77886
Eggs	ALA. CODE §§2-8-150 to -171; KY. REV. STAT. ANN. §§247.850-.865; LA. REV. STAT. ANN. §§3:551.1-.12; MISS. CODE ANN. §§69-7-251 to -275; NEB. REV. STAT. §§2-3401 to -3416; VA. CODE ANN. §§3.1-796.11:2 to -796.11:10

Flowers	CAL. FOOD & AGRIC. CODE §§77901-78006
Forest products	CAL. FOOD & AGRIC. CODE §§77501-77666
Goats	ALA. CODE §§2-8-310 to -32; N.M. STAT. ANN. §§77-8A-1 to -11;
Grain	ALA. CODE §§2-8-230 to -252; ARIZ. REV. STAT. §§3-581 to -594; KAN. STAT. ANN. §§2-3001 to -3013; KY. REV. STAT. ANN. §§247.5061-.5095; LA. REV. STAT. ANN. §§3:551.31-.36; OR. REV. STAT. §576.062(6); VA. CODE ANN. §§3.1-684.41 to -684.58
Grape rootstock	CAL. FOOD & AGRIC. CODE §§74750-74796
Honey	IDAHO CODE §§22-2801 to -2810; N.D. CENT. CODE §§4-12.1-01 to -09
Hops	IDAHO CODE §§22-3101 to -3117; OR. REV. STAT. §576.062(16)
Kiwifruit	CAL. FOOD & AGRIC. CODE §§68001-68140
Mint	IDAHO CODE §§22-3801 to -3816; MONT. CODE ANN. §§80-11-401 to -419; OR. REV. STAT. §576.062(17)
Nuts	ALA. CODE §§2-8-120 to -137; OKLA. STAT. ANN. tit. 2, §§18-50 to -62; VA. CODE ANN. §§3.1-647 to -665
Oilseeds	N.D. CENT. CODE §§4-10.2-01 to -13; S.D. CODIFIED LAWS §§38-27-1 to -19
Onions	OR. REV. STAT. §576.062(26)
Oysters	TEX. AGRIC. CODE §§47.001-.055
Pears	OR. REV. STAT. §576.062(10)

Peas/lentils	IDAHO CODE §§22-3501 to -3518; N.D. CENT. CODE §§4-10.7-01 to -17
Pepper	CAL. FOOD & AGRIC. CODE §§77201-77376
Pistachios	CAL. FOOD & AGRIC. CODE §§69001-69114
Pork/swine	ALA. CODE §§2-8-40 to -62; IDAHO CODE §§25-3401 to -3407; IOWA CODE §§183A.1-.14; LA. REV. STAT. ANN. §§3:551.81-.85; S.D. CODIFIED LAWS §§38-33-1 to -12;
Potatoes	IDAHO CODE §§22-1201 to -1215; ME. REV. STAT. ANN. tit. 7, §§991-994, 2151-2157; MICH. COMP. LAWS §§290.421-.429a; NEB. REV. STAT. §§2-1801 to -1826; N.D. CENT. CODE §§4-10-01.1 to -22; OR. REV. STAT. §576.062(8); VA. CODE ANN. §§3.1-684.20 to -684.41
Poultry	NEB. REV. STAT. §§2-3401 to -3416; OR. REV. STAT. §576.062(14); VA. CODE ANN. §§3.1-796.02 to -796.020
Ratite	MISS. CODE ANN. §§69-43-1 to -13
Rice	CAL. FOOD & AGRIC. CODE §§71000-71138; LA. REV. STAT. ANN. §§3:551.61-.68; MISS. CODE ANN. §§69-10-1 to -13;
Salmon	CAL. FOOD & AGRIC. CODE §§76501-76961; OR. REV. STAT. §576.062(4)
Sea urchins	CAL. FOOD & AGRIC. CODE §§79000-79145

Sheep/wool	ALA. CODE §§2-8-310 to -326; CAL. FOOD & AGRIC. CODE §§76201-76384; 505 ILL. COMP. STAT. 115/1-115/23; IOWA CODE §§182.1-.24; KY. REV. STAT. ANN. §§247.6901-.6957; N.M. STAT. ANN. §§77-8A-1 to -11; OR. REV. STAT. §576.062(7); VA. CODE ANN. §§3.1-1065 to -1079
Shrimp	TEX. AGRIC. CODE §§47.001-.055
Sorghum	OKLA. STAT. ANN. tit. 2, §§18-240 to -251; NEB. REV. STAT. §§2-4001 to -4020
Soybeans	ALA. CODE §§2-8-80 to -103; 505 ILL. COMP. STAT. 130/1-130/25; IOWA CODE §§185.1-.34; KY. REV. STAT. ANN. §§247.510-.595; LA. REV. STAT. ANN. §§3:551.31-.36; MISS. CODE ANN. §§69-9-1 to -13; NEB. REV. STAT. §§2-3325 to -3331; N.D. CENT. CODE §§4-10.5-01 to -14; S.D. CODIFIED LAWS §§38-29-1 to -14; TENN. CODE ANN. §§43-20-201 to -216; VA. CODE ANN. §§3.1-684.2 to -684.19
Strawberries	CAL. FOOD & AGRIC. CODE §§77401-77500; LA. REV. STAT. ANN. §§3:471-478; OR. REV. STAT. §576.062(22)
Sweet potatoes	LA. REV. STAT. ANN. §§3:451-458; VA. CODE ANN. §§3.1-666 to -684
Table grapes	CAL. FOOD & AGRIC. CODE §§65500-65675
Tomatoes	CAL. FOOD & AGRIC. CODE §§78601-78725
Tree fruit	WASH. REV. CODE §§15.28.010-.910; W. VA. CODE §§19-2G-1 to -10
Turkey	N.D. CENT. CODE §§4-13.1-01 to -13
Walnuts	CAL. FOOD & AGRIC. CODE §§77001-77195

Wheat	CAL. FOOD & AGRIC. CODE §§72001-72135; IDAHO CODE §§22-3301 to -3319; 505 ILL. COMP. STAT. 145/1-145/110; MONT. CODE ANN. §§80-11-201 to -224; NEB. REV. STAT. §§2-2301 to -2321; N.D. CENT. CODE §§4-28-01 to -09; OR. REV. STAT. §§578.010-.990; S.D. CODIFIED LAWS §§38-10-1 to -41; WYO. STAT. ANN. §§11-38-101 to -110
Wine	MO. REV. STAT. §§275.460-.468; N.J. STAT. ANN. §§4:10-76 to -79; WASH. REV. CODE §§15.88.010-.902
Wine grapes	CAL. FOOD & AGRIC. CODE §§74801-74996

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IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: October 15, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, violates the First Amendment by requiring beef producers and importers to fund generic advertising for beef, despite their objections to the advertisements.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting commercial speech rights, appearing before this Court in cases raising commercial speech issues. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). WLF successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd,* 202 F.3d 331 (D.C. Cir. 2000). WLF also has appeared before this Court to challenge government efforts to compel commercial entities to provide financial support for others' speech. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici strongly object to government efforts to compel individuals or corporations to speak against their will. *Amici* are concerned that the First Amendment standards proposed by Petitioners and their supporting *amici* are so lax as to permit compelled financial support of private speech based on a mere showing that the compelled support would rationally serve government policy. *Amici* believe it important for the Court to make clear that First Amendment protections against compelled speech are not so easily trammeled. *Amici* also agree with Respondents that the speech which they are being forced to support does not constitute "government speech" exempt from First Amendment scrutiny, albeit this brief does not focus on that issue.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Respondents -- five cattle producers, an association of livestock markets whose members collect and remit millions of dollars of "beef checkoff" assessments each year, and an association of groups dedicated to protecting family farms -- are challenging a program that requires them to contribute financially to generic beef advertising campaigns they find objectionable.

The Beef Promotion and Research Act of 1985 (the "Beef Act"), 7 U.S.C. § 2901 *et seq.*, establishes a federal program to promote beef sales. The program is financed by a $1-per-head assessment (often referred to as a "checkoff") on all cattle sold in, or imported into, the United States. 7 U.S.C. § 2904(8). A U.S. Department of Agriculture order issued pursuant to the Beef Act (the "Beef Order") establishes two governing bodies -- the Cattlemen's Beef Promotion and Research Board (the "Beef Board") and the Beef Promotion Operating Committee (the "Operating Committee") -- to oversee implementation of the Beef Act.

Although the Secretary contends that the program advances a "substantial government interest" because it prevents "further decay" in the beef industry that would "endanger" both the nation's beef supply and the "entire economy" (U.S. Br. 39-40), the Beef Act leaves the decision whether to continue the program entirely up to a vote of a majority of cattle producers and importers. The Act provided for a referendum among cattle producers and importers no later than 22 months after adoption of the Beef Order, and for termination of further collection of assessments unless a majority of those voting approved continuation. 7 U.S.C. § 2906(a).[2] It provides for additional referenda at the request of at least 10% of producers. 7 U.S.C. § 2906(b). Since 1999, Respondent Livestock Marketing Association ("LMA") has been petitioning the Secretary -- thus far without success -- to conduct a new referendum.

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[2] The initial referendum was conducted in 1988. More than 20% of producers voted to end the program. U.S. Br. 4. Pursuant to the terms of the Beef Act, those dissenters continue to be subject to the $1-per-head checkoff.

The beef checkoff program generated $82.7 million in revenue during 2003. U.S. Br. 7. A significant majority of those funds is used for generic beef advertising. Federal Petition Appendix ("Pet. App.") 11a. The "mandatory" $1-per-head assessment is "directly linked" to beef producers' "source of livelihood," and thus "they have no meaningful opportunity to avoid these assessments." *Id.*

Respondents' amended complaint alleges that the Beef Act and the Beef Order violate the First Amendment to the extent that they require cattle producers and importers to pay assessments for generic advertising. After a two-day trial, the district court ruled that the Beef Act and Beef Order violated the First Amendment by requiring Respondents to pay for private speech to which they object. Pet. App. 31a-61a. It issued an injunction barring further collection of beef checkoffs. *Id.* at 60a-61.

The appeals court affirmed. Pet. App. 1a-30a. The court rejected the Secretary's assertion that the "government speech" doctrine immunized the checkoff program from First Amendment scrutiny, finding that doctrine largely inapplicable to compelled speech cases. *Id.* at 17a-20a. Instead, the court applied the test established in *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), for analyzing government restrictions on commercial speech. *Id.* at 22a. The court concluded that the beef checkoff program flunked that test, stating, "[W]e conclude that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment rights." *Id.* at 28a.

SUMMARY OF ARGUMENT

The First Amendment protects not only freedom of speech, but also the freedom not to speak. Those restrictions on the government's power to compel speech extend fully to government efforts to compel financial support of speech to which one objects.[3]

The Secretary contends that regardless whether the beef checkoff program implicates Respondents' First Amendment rights, those rights are outweighed by the government's assertedly strong interest in compelling all beef producers and importers to finance a beef promotion campaign. Particularly troublesome is the Secretary's suggestion that a more relaxed standard of review should apply because the speech for which she seeks compelled support happens to be commercial speech (i.e., speech that "proposes a commercial transaction"). It makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity applying the compulsion that determines whether funds are to be used for commercial or noncommercial speech. Moreover, the rationale for permitting a somewhat relaxed standard of review in cases involving *regulation* of commercial speech is wholly inapplicable in the context of *compelled* speech.

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[3] The Secretary insists that the speech at issue here is the government's own and for that reason is exempt from First Amendment scrutiny under the "government speech" doctrine. *Amici* disagree with those contentions, but this brief does not address them -- except to observe that it strikes us as anomalous to deem beef advertisements to be government speech when the decision whether to speak *at all* is left wholly in the hands of private parties. *See* 7 U.S.C. § 2906 (beef producers at any time may vote by referendum to discontinue the beef checkoff program).

The advertising program at issue in this case, when subjected to an appropriately strict standard of First Amendment review, cannot withstand constitutional scrutiny. The Secretary has failed to articulate any vital policy interest served by the program, nor has she even attempted to demonstrate that the program is narrowly tailored to minimize interference with First Amendment rights.

ARGUMENT

I. COMPELLED SPEECH IS NOT SUBJECT TO MORE RELAXED REVIEW SIMPLY BECAUSE THE SPEECH TO BE COMPELLED IS COMMERCIAL IN NATURE

The Secretary seeks to lessen her evidentiary burden by noting that the speech she is attempting to compel in this case is commercial in nature. U.S. Br. 37-42. The Secretary argues:

> Because a requirement to provide money for commercial speech increases the total amount of information available to consumers and therefore interferes with First Amendment interests far less than a prohibition on commercial speech, the government should have greater flexibility to impose a funding requirement. * * * At the very least, a program that increases the amount of information that is made available to consumers should not be subjected to a more intense level of review than that afforded to restrictions on commercial speech.

Id. at 39.

The Secretary's reliance on case law concerning government attempts to *suppress* commercial speech is wholly

misplaced and would lead to a dangerous erosion in First Amendment protections against compelled speech. The Court's rationale for permitting a somewhat relaxed standard of review in cases involving regulation of commercial speech[4] is wholly inapplicable in the context of compelled speech.

In a decision striking down Rhode Island's ban on liquor price advertising, the Court reiterated the two justifications traditionally cited for affording the government more leeway in its regulation of commercial speech: (1) "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones"; and (2) "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 499 (1996). Neither of those two justifications has any relevance to government efforts to *compel* speech.

First, government compulsion of speech cannot logically further the government's interest in preventing the dissemination of false advertising. The only speech being propounded is the speech that the government is attempting to

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[4] The Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473 (1989). Fully protected speech is not transformed into commercial speech simply because it is uttered by a corporation, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), or that the speaker is motivated by a desire for a profit. As the Court explained in *Fox*, "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

compel. In the absence of that compulsion, there would be no speech and thus no cause to worry about false advertising.

Second, there is no basis for concluding that compelled commercial speech is any hardier than other forms of compelled speech. All forms of compelled speech are extremely "hardy" since they are backed by the force of law. Nor is there any reason to suppose that compelled noncommercial speech will have any more chilling effect on voluntary speech than would compelled commercial speech; a chilling effect on voluntary speech is simply not one of the dangers of compelled speech, whether commercial or noncommercial.

Moreover, it makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity that is applying the compulsion that determines whether funds are to be used for commercial speech or noncommercial speech. Why should government entities that compel payments into a fund used to finance private speech be afforded a lower level of First Amendment scrutiny simply because the funds ultimately are used to promote a product rather than, say, to encourage consumers to quit smoking?[5]

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[5] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("Whatever the validity of [the Court's rationale for providing a lesser degree of First Amendment protection for commercial speech], it is limited to the peculiarly *commercial* harms that commercial speech can threaten -- *i.e.*, the risk of deceptive or misleading advertising."). In asserting that commercial speech is entitled to full First Amendment protection in all other contexts, Justice Thomas explained: "Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the

(continued...)

Under the Secretary's theory, a lower level of First Amendment review would be applied to a government program requiring Amish citizens to contribute to a fund for advertising General Motors cars than to a program requiring those same citizens to contribute to a nonprofit health-awareness program. The Amish citizens might object to being forced to promote a means of transportation which they shun, but (under the government's theory) the compelled speech on behalf of General Motors would be subjected to more lenient First Amendment review because an advertisement promoting the sale of General Motors cars clearly qualifies as commercial speech. It is no answer to respond that the Amish citizens' objections are entitled to greater weight because they are deeply felt or in some sense "ideological," because such a response would enmesh the Court in the impossible task of assigning comparative weights to objections to compelled commercial speech. For example, would a Ford Motor Co. executive (who believes that Ford cars are superior to General Motors cars) have less basis than Amish citizens for objecting to being compelled to fund General Motors advertisements?

Amici submit that the Court lacks any objective method of weighing the strength of objections of those compelled to fund commercial speech. Respondents object to being compelled to fund the generic beef advertising program because they sincerely believe that the program conveys an erroneous message (that all brands of beef are the same). There can be no principled basis for distinguishing that

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[5](...continued)
category." *Id. See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (city may not discriminate in the siting of newsracks containing commercial flyers, where the problem allegedly caused by such newsracks (littering) is identical to the problem caused by newsracks containing general circulation newspapers).

objection from any other sincerely held "ideological" objection. Indeed, this Court has cautioned against *any* attempt by courts to discern the basis for objections to compelled speech:

> [T]he employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977). Unless the Court is prepared to rule that *all* compelled commercial speech is entitled to a lesser degree of First Amendment protection no matter how strongly felt the objections may be, there can be no basis for the Secretary's claim that the commercial nature of the speech she is attempting to compel in this case lessens Respondents' First Amendment protections.

Nor may the Secretary rely on commercial speech case law that upholds disclaimer requirements designed to eliminate potential deception in existing advertisements. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court upheld an Ohio rule requiring lawyers whose advertisements are potentially misleading to include warnings or disclaimers in the advertisements in order to "dissipate the possibility of consumer confusion or deception." *Zauderer*, 471 U.S. at 651. But the Court has endorsed compelled disclaimer requirements *only* for the purpose of counteracting potentially misleading messages included in the advertisement; the Court has *never* imposed such requirements on individuals or businesses who

have not initiated the advertisements on their own. As the Court later explained:

> The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or expressly contrary to the corporation's views.

Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 n.12 (1986) (pluality). *See also Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 803 (1988) (Scalia, J., concurring in part and concurring in judgment) ("[T]he state can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made."); *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (in striking down compelled funding of mushroom advertisements, Court distinguishes *Zauderer*, stating, "There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.").

Nor is the Secretary's argument for a relaxed standard of First Amendment review advanced by her assertion that the checkoff program "increases the total amount of information available to consumers." U.S. Br. 39. Respondents object not to the increased dissemination of information to consumers, but to being forced to pay for the dissemination of information

with which they disagree. The Secretary's argument is based on a false premise: that the First Amendment protects commercial speech for the sole purpose of maximizing information made available to consumers (the listeners). To the contrary, the Court has made clear that the First Amendment *also* protects the interests of commercial entities in conveying whatever truthful and nonmisleading information they wish to convey -- no more and no less. *See, e.g., Pacific Gas & Electric*, 475 U.S. at 15 (plurality). Forcing beef producers to pay for advertisements to which they object deeply offends their First Amendment interests. Moreover, there is nothing in the record to support the Secretary's assertion that the checkoff program increases the volume of information available to consumers; there is no reason to believe that in the absence of the checkoff program, information promoting beef consumption would not be conveyed through a voluntary or government-funded program.

Finally, *amici* note that none of the Court's compelled speech decisions indicate that the level of First Amendment review depends on whether the compelled speech is commercial in character. In *Glickman*, a challenge to compelled funding of generic promotion of peaches, plums, and nectarines, the Court declined to evaluate the funding program under the First Amendment standards set forth in *Central Hudson*, and it held that the appeals court had erred in having done so. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474 & n.18 (1997) ("The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech."). In *United Foods*, a challenge to compelled funding of advertisements for mushrooms, the Court declined to consider whether the commercial nature of compelled speech is of constitutional significance because "even viewing commercial speech as

entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United Foods,* 533 U.S. at 410.

In sum, nothing in the Court's past treatment of government efforts to *regulate* commercial speech lends support to the Secretary's argument that the government should be afforded greater latitude when compelling funding of commercial speech than when compelling funding of noncommercial speech.

II. THIS CASE IS GOVERNED BY THE *BARNETTE* AND *ABOOD* LINE OF DECISIONS, WHICH REQUIRE VERY CLOSE SCRUTINY OF ANY GOVERNMENT EFFORT TO COMPEL SPEECH

Although the federal government now argues that compelled advertising programs should be judged under the *Central Hudson* test, it asserted in both *Glickman* and *United Foods* that the correct rule of decision derives from *Abood* and other cases in which the Court has considered government efforts to coerce support for expressive activities from unwilling speakers. *See Glickman*, Brief for the United States at 14-16; *United Foods*, Brief for the United States at 16-17. Indeed, in a brief opposing a prior effort to bring before the Court a First Amendment challenge to the beef checkoff program, the Secretary asserted, "*Central Hudson,* a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech." *See Goetz v. Glickman*, No. 98-607, *cert. denied*, 525 U.S. 1102 (1999), Brief for the Federal Respondent in Opposition at 14-15 (Dec. 1998) (emphasis in original).

Amici agree with the Secretary's former position that the Court ought to look for guidance primarily from the *Abood* line of decisions. *Abood* and its progeny impose an exacting measure of First Amendment scrutiny on any government effort to compel speech by individuals or business entities. The beef checkoff program cannot survive that scrutiny.

Starting with its decision in *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943), which struck down a law requiring school children to recite the Pledge of Allegiance regardless of their objections to doing so, the Court has made clear that the First Amendment protects not only freedom of speech, but also the freedom not to speak. *See also Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977) (New Hampshire may not require objecting motorists to display the state motto, "Live Free or Die," on automobile license plates).

The Court has repeatedly held that constitutional restrictions on compelled speech extend to compelled financial support of private organizations' speech. Thus, First Amendment rights are implicated by compelled support of, *e.g.*, a state bar association, *Keller v. State Bar of California*, 496 U.S. 1 (1990), or a labor union by a public-sector employee. *Abood*, 431 U.S. at 222. The Court has never suggested that a different constitutional analysis is required depending on whether the compulsion takes the form of government efforts to force individuals to utter specific words (as in *Barnette*) or the form of monetary exactions earmarked to finance speech by non-government entities (as in *Keller* and *Abood*).

Under *Abood* and its progeny, government efforts to compel financial support of the speech of private organizations is subject to exacting First Amendment scrutiny. First, the government must demonstrate that the *compelled* financial

support serves some extremely important government interest. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991)(plurality).[6] Second, the funded activity must be "germane" to the government interest relied upon. *Id.* Third, the compulsory funding scheme must be narrowly tailored. *Chicago Teachers Union*, 475 U.S. at 303 & n.11; *Pacific Gas & Electric*, 475 U.S. at 19 (plurality). That is, it must not "significantly add to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality).

The Secretary's portrayal of *Abood* as a broad endorsement of compelled speech, U.S. Br. 38, is inaccurate. *Abood* involved an "agency shop" arrangement between a public school board and the union representing teachers, whereby teachers who declined to join the union were required to pay the union an "agency fee" -- a fee precisely equal to the dues paid by union members. The Court held that such compelled support of a union "ha[d] an impact upon [nonunion

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[6] The Court has used a variety of phrases to describe the showing required of the government in demonstrating the importance of its challenged policy interest. In *Lehnert*, the Court stated that the government must show that its policy interest is "vital." *Id.* Other cases have required that the government demonstrate that its interest is "compelling." *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.11 (1986). *Abood* itself was silent on the issue, instead relying without discussion on previous case law which established that "the important contribution of the union shop to the system of labor relations established by Congress" was sufficient to justify requiring employees to finance the collective bargaining activities of a union serving as the employees' exclusive bargaining representative. In any event, the precise verbal formulation of the government's burden is not of crucial significance; the important point is that the Court has imposed an extremely heavy burden on governments seeking to justify their efforts to compel speech.

members'] First Amendment interests," *Abood*, 431 U.S. at 222, and was impermissible except to the extent that the compelled support directly served some very important government interest. *Id.* at 234-236. The Court ruled that one such interest was the maintenance of labor peace -- which Congress had determined was directly advanced by creation of a system under which employee interests would be served by an exclusive bargaining agent. *Id.* at 220-224. Since under that system, a union designated as an exclusive bargaining agent was required to represent all employees within the bargaining unit (even nonmember employees), the Court determined that the exclusive bargaining agent system would be undermined by the "free rider" problem -- the financial incentive that employees have "to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees" -- unless nonmembers could be required to pay for such benefits. *Id.* at 221-222.

The Court nonetheless made clear that the First Amendment prohibits a union from charging nonmembers for expressive activities *not* directly related to the union's collective bargaining functions. *Id.* at 232-237. The Court determined that nonmembers may not be required to share in the costs of the union's political contributions or of expressing the union's views on issues unrelated to its duty as exclusive bargaining representative, *id.* at 234, but it left for future cases the drawing of a precise line between union activities that constitute collective bargaining activities and those that do not. *Id.* at 236-237.[7]

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[7] That line-drawing process has been the subject of numerous subsequent federal court suits. *See, e.g., Lehnert; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984). Although the courts on occasion have had difficulty in drawing the line

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Keller applied *Abood*'s compelled speech analysis in the context of mandatory dues paid to a state bar association, finding that such dues impinge on lawyers' First Amendment rights. *Keller*, 496 U.S. at 13. The Court noted that it had previously held, in *Lathrop v. Donohue*, 367 U.S. 820 (1960), that states have a very strong interest in regulating the legal profession and improving the quality of legal services, and that in order to avoid the "free rider" problem, "[i]t is entirely appropriate" that lawyers share in the cost of such regulation -- which directly benefits lawyers by, among other things, excluding nonlawyers from the practice of law. *Id.* at 12. The Court made clear, however, that the First Amendment prohibits a state from requiring lawyers to fund expressive bar association activities not related to the bar association's function as a regulator of the legal profession. *Id.* at 15-16. As in *Abood*, the Court declined to draw a bright line between "related" activities and "unrelated" activities. *Id.* As examples of unrelated expressive activity that lawyers could not be compelled to fund, the Court listed "endorse[ment] or advance[ment] [of] a gun control or nuclear weapons freeze initiative," two of the activities in which the State Bar of California had engaged. *Id.* at 16.

It is important to note that the principles articulated in *Abood* and *Keller* extend to compelled funding of *any* speech or expressive activity, not simply to "political" speech. For example, *Abood* provided a lengthy list of traditional union expressive activities which could have "an impact upon the[]

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[7](...continued)
with precision, reported decisions have repeatedly emphasized that the *only* government interest that justifies impingement on the First Amendment rights of nonunion employees is the interest in maintaining a system of exclusive bargaining agents. *See, e.g., Lehnert*, 500 U.S. at 520-521.

First Amendment rights" of dissenting employees, only a few of which activities could be deemed "political" as that term is commonly used:

> [An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating a limit on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

Abood, 431 U.S. at 222. *See also id.* at 231 ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a nonexhaustive list of labels -- is not entitled to full First Amendment protections."); *Lehnert*, 500 U.S. at 521-522 (plurality) ("First Amendment protection is in no way limited to controversial topics or emotionally charged issues."). As the Court made clear in *Wooley*, the First Amendment protects "the right to refrain from speaking *at all*," not simply the right to refrain from speaking on political or controversial subjects. *Wooley*, 430 U.S. at 714 (emphasis added).[8] Thus, it is no

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[8] Of course, compelled funding of activities with no expressive content does not raise First Amendment concerns. Thus, the Court held in *Ellis* and again in *Lehnert* that "union social activities" were properly chargeable to dissenters (who were free to participate in the activities) because the "communicative content" of the activities was minimal, if

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defense to Respondents' First Amendment objections to the beef advertising program that those objections are based on aesthetic disagreements regarding the quality of beef, rather than on hotly debated political differences.[9]

The Secretary suggests in passing that the *Abood* line of cases imposes a level of First Amendment scrutiny that is no higher than that imposed by *Central Hudson*. U.S. Br. 38. The American Cotton Shippers Association, *et al.* ("ACSA"), carry that argument even further, insisting that *Abood* actually imposes a significantly more relaxed standard of review than does *Central Hudson*. Brief *Amici Curiae* of ACSA at 5-16. Both briefs display a fundamental misunderstanding of *Barnette, Abood*, and their progeny. The ACSA contends that, under *Abood*, compelled financial support of the expressive activities of private parties should be upheld so long as such compelled support is "germane" to some "independent, non-

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[8](...continued)
any. *Ellis*, 466 U.S. at 456; *Lehnert*, 500 U.S. at 529 (plurality); *id.* at 559-560 (Scalia, J., concurring in the judgment in part and dissenting in part). Accordingly, putting severability issues to one side, compelled funding for those portions of the Beef Board's activities that lack expressive content (if any) may not be vulnerable to First Amendment challenge.

[9] There is language in *Glickman* suggesting that the majority questioned whether the promotional activities funded by agricultural marketing orders are sufficiently expressive to warrant First Amendment protection. *Glickman*, 521 U.S. at 471, 473 & n.16. That language, which was largely extraneous to the Court's holding, is in significant tension with the passages from *Abood* and *Lehnert* quoted above, and is contradicted by *United Foods*, which held that similar promotional activities for mushrooms directly implicated First Amendment rights. *Amici* respectfully request that the Court expressly disavow the *dicta* in *Glickman* that suggest that compelled support of agricultural advertising may not implicate First Amendment rights.

speech related purpose." ACSA Br. 8. Thus formulated, the ACSA's test amounts to little more than rational basis review of compelled speech. The Court's compelled speech decisions make clear that government interference with the First Amendment right not to speak is not to be treated so cavalierly.

The ACSA's portrayal of the *Barnette/Abood* line of cases is faulty not simply because of its attempts to minimize a government's burden in demonstrating that the compelled speech serves some extremely important interest. The ACSA also eliminates all consideration of the "narrow tailoring" requirement[10] and wholly misconstrues the "germaneness" test. The word "germane" arose in both *Abood* and *Keller* only after the Supreme Court had determined that the defendants in those cases were justified, in limited circumstances, in compelling financial support for some of their expressive activities.[11] Once the Court had determined that there were at least *some* expressive activities for which a defendant could compel financial contribution without violating First Amendment rights, the Court was required to determine which expressive

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[10] As noted *supra* at 15, *Chicago Teachers Union, Pacific Gas & Electric,* and *Lehnert* all made crystal clear that compelled financial support of the speech of private organizations violates the First Amendment unless it is "narrowly tailored," meaning that the infringement of First Amendment rights is the minimum amount necessary to achieve the government's purpose.

[11] As noted above, the principal justification in *Abood* for permitting unions to impose a collective bargaining fee on nonmembers was that doing so was the only way of avoiding the "free rider" problem whereby employees could take advantage of (but not pay for) the collecting bargaining services that unions are required to provide to all employees in a bargaining unit. *Abood,* 431 U.S. at 220-222.

activities fell into that protected category. That is where the term "germane" arose. As the Court explained in *Keller*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not *germane* to the purpose for which compelled association was justified: collective bargaining.

Keller, 496 U.S. at 13. Thus, "germaneness" is not a test that permits defendants to compel support for expressive activities that further some important governmental, non-speech related interest. Rather, the burden of proof is on a defendant in a compelled-financial-support case to demonstrate why *compelled* support is necessary (*i.e.*, why the government's vital policy interest could not be achieved without requiring dissenters to support speech with which they disagree). Only after that burden has been met may a defendant then seek to demonstrate that particular expressive activities are permissible because they are "germane" to the purpose for which compelled support is justified.

Under the ACSA's view of compelled speech doctrine, the government would be free to compel school children to recite the Pledge of Allegiance in classrooms. Inculcating a spirit of national unity would appear to qualify as an "independent, non-speech related" objective, and compelled recitation of the Pledge of Allegiance is undoubtedly "germane" to that objective. Yet even in the middle of World War II, the Court in *Barnette* rejected a school board's argument that the spirit of national unity fostered by recitation of the Pledge of Allegiance should override First Amendment concerns. *Barnette*, 319 U.S. at 640-641. Indeed, the Court has made clear that in the context of protected speech, any difference between compelled speech and compelled silence "is without constitutional significance, for the First

Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-797. Just as the Court has been extremely reluctant to permit government regulation of protected speech, so too should it be extremely reluctant to permit the government to compel speech except in the rarest of circumstances. Moreover, *Pacific Gas & Electric* makes clear that corporations enjoy the same First Amendment protections against compelled speech as do individuals. *Pacific Gas & Electric*, 475 U.S. at 16.

We note in passing that the lower courts have uniformly rejected the ACSA's assertion that the *Barnette/Abood* line of cases establishes a more relaxed standard of review than that provided under *Central Hudson* in commercial speech regulation cases. The Third Circuit in *Frame* stated that the *Abood* line of compelled speech decisions provided the rule of decision in a First Amendment challenge to the Beef Act. *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1994). The court said that *Abood* and its progeny employ "a higher standard of scrutiny than employed in cases involving only regulation of commercial speech," such as *Central Hudson*. *Id.* *See also Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429, 436 (9th Cir. 1993) ("[B]ecause we hold the almond marketing program unconstitutional even under the *less stringent Central Hudson* standard, we do not decide which of these two should apply.") (emphasis added).

In sum, *Abood* imposes an exacting standard of review on government efforts to compel financial support of private speech, a standard which (as demonstrated in Part III, *infra*) the Secretary has not come close to meeting.

III. THE COMPELLED ADVERTISING PROGRAM CANNOT BE SUSTAINED UNDER THE TEST ESTABLISHED BY *ABOOD* FOR COMPELLED FINANCIAL SUPPORT

A. The Government Has No Vital Policy Interest in Financing the Beef Checkoff Program Through Compelled Contributions

The Secretary's arguments in support of the mandatory beef checkoff program fall far short of satisfying the burden imposed by *Abood* and its progeny on governments seeking to compel financial support of private speech.

In particular, the Secretary has failed to articulate anything approaching a "vital" policy interest in maintaining the disputed advertising program. We note that thousands of commodities are successfully marketed in this country without the benefit of federal government-imposed advertising programs (e.g., bananas and Georgia peaches). It is difficult to understand how the beef checkoff campaign can be deemed "vital" when the evidence plainly indicates that such campaigns are not necessary to permit American agriculture to survive. Even accepting for the sake of argument the Secretary's claims that the compelled beef checkoff campaign leads to increased product sales, effectuating marginal increases in sales within a relatively healthy industry is hardly on a par with the policy interests cited in *Abood* (preservation of labor peace by strengthening the collective bargaining process) as the bases for assessment of agency fees on dissenting employees.

The Court noted in *Abood* that prohibiting the collection of agency fees from dissenting employees -- thereby allowing them to become "free riders" -- could completely undermine

the exclusive representation system upon which American labor law is based. *Abood,* 431 U.S. at 223-224. The Court held that Michigan was justified in fearing that if the exclusive representation system were undermined, "confusion and conflict . . . could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. No similar calamity is plausible if the beef checkoff program were ended.

Moreover, *Abood* has been explained in later decisions as based primarily on the recognition of the inequity of permitting "free riders" to refuse to bear their fair share of collective bargaining. As the Court stated in *Ellis,* "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders -- employees in the bargaining unit on whose behalf the union was obliged to perform its statutory function, but who refused to contribute to the cost thereof." *Ellis,* 466 U.S. at 447. Despite the Secretary's claims to the contrary, no similar "free rider" problem exists in this case.

Respondents are "free riders" only in the sense that they have arguably benefitted from the federal advertising program to which they object. But any such benefit is only incidental to the programs' professed desire to benefit the industry as a whole; the advertising committees are under no obligation to create advertising that will be of special benefit to Respondents.[12] In contrast, a union is *required* to provide particularized benefits for *each* employee within its bargaining unit,

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[12] Indeed, Respondents allege that members of the Beef Board and the Operating Committee have promoted the interests of some beef producers at the expense of others'.

regardless whether the employee is one who objects to paying money to the union. For example, the union is required to provide fair representation to dissenting employees in any grievance proceeding they may initiate with the employer. Thus, Respondents are simply not the type of "free riders" that *Abood* had in mind. As Justice Scalia explained in *Lehnert:*

> [W]here the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that alone does not empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry -- indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.

Lehnert, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). *See also Abood,* 431 U.S. at 222 ("benefits of union representation * * * necessarily accrue to all employees").

Respondents are no more "free riders" than are rival long-distance telephone companies when AT&T encourages consumers to "reach out and touch someone" by placing a

long-distance phone call. Those companies undoubtedly benefit from such advertisements, but that benefit is hardly sufficient justification for overriding their First Amendment objections to being compelled to contribute to the costs of the advertisements.

Nor may the Secretary obviate the need for demonstrating a vital policy interest in this case by pointing out that Respondents have voluntarily chosen to become beef producers. The Court has routinely rejected arguments that the government may condition citizens' right to participate in routine commercial activities on their willingness to relinquish First Amendment rights. For example, *Wooley* held that New Hampshire could not condition motorists' access to its highways on their relinquishment of First Amendment objections to displaying the state motto, "Live Free or Die," on their cars. *Wooley*, 430 U.S. at 713-715. Nor does the First Amendment permit a state to condition employment in a government job on public support of a political party; the First Amendment is violated in such cases even though the prospective employee may easily avoid the "compelled" speech by simply refusing to accept the proffered job. *Elrod v. Burns*, 427 U.S. 347 (1976). The trial court expressly found that payment of the beef checkoff is "directly linked" to Respondent's "source of livelihood," and that "they have no meaningful opportunity to avoid these assessments"; and the appeals court stated that it agreed with those factual findings. Pet. App. 11a. Under those circumstances, the burden on Respondents' First Amendment rights is not lessened by their ability to avoid checkoff payments by ceasing beef production.

In sum, the Secretary has failed to demonstrate a policy interest sufficiently "vital" to justify its infringement of Respondents' First Amendment rights. The interests asserted by the Secretary in support of the beef checkoff program do

not begin to approach the level required by *Abood, et al.* to permit infringement of First Amendment protections against compelled speech.

B. The Beef Checkoff Program Is Not Narrowly Tailored to Achieve Any Government Policy Interest

The beef checkoff program is constitutionally defective for the additional reason that it is not narrowly tailored to achieve any of the Secretary's identified policy interests. Indeed, the Petitioners' briefs fail even to acknowledge the existence of a "narrow tailoring" requirement in compelled speech cases.

While *Abood* is silent on the issue of narrow tailoring,[13] more recent cases have made clear that compelled speech cannot pass constitutional muster unless it is narrowly tailored to serve the government's vital policy interests. *Lehnert,* 500 U.S. at 519 (plurality); *Chicago Teachers Union,* 475 U.S. at 303 & n.11; *Pacific Gas & Electric,* 475 U.S. at 19 (plurality). Even assuming that the Secretary has a "vital" interest in compelling all beef producers to support the beef checkoff, she could easily do so while infringing on Respondents' First Amendment rights to a far lesser extent.

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[13] That silence can hardly be viewed as an indication that the *Abood* Court believed that there were no limits on how far a government could go in infringing First Amendment rights so long as all measures enacted were germane to its vital policy interests. Rather, the Court had no occasion to address that issue; it simply determined that some core union functions were properly chargeable to dissenting employees and that other functions not germane to those core functions were not chargeable, and it left more precise line drawing for later cases.

The Secretary's interest in sales promotion could be satisfied by simply requiring each producer to spend not less than a fixed amount on promotional campaigns; the producer would then be free to decide whether to contribute his promotional funds to the current advertising campaign or to develop his own campaign. By granting each producer a greater say in how his promotional funds would be used, such a system would impose far less of a burden on First Amendment rights while at the same time ensuring that adequate amounts are expended each year on promotional campaigns. Indeed, numerous federal agricultural promotional campaigns -- including the almond promotion program at issue in *Cal-Almond* -- provide handlers with credits for funds they spend on their own promotional activities; there is no evidence in the record that such programs have proven any less effective in promoting sales than programs without a credit option.

Alternatively, the Secretary's policy interests could be achieved in a more narrowly tailored manner if the advertising programs were funded through general tax revenues. As the Supreme Court explained in *Keller*, 496 U.S. at 10-13, use of general tax revenues to disseminate a particular viewpoint does not raise First Amendment concerns. Thus by definition, an advertising program funded through general tax revenues would be far less restrictive of First Amendment rights than is the current program -- and therefore the current program cannot be said to be narrowly tailored to achieving the Secretary's policy interests.[14]

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[14] Moreover, given the absence of a "free rider" problem of the type present in *Abood*, there is no basis for contending that taxpayer funding fails to address the Secretary's interests in correcting the inequities arising from the presence of "free riders."

A third method of achieving the Secretary's policy interests in a more narrowly tailored manner would be to encourage beef producers and importers to enter into voluntary cooperative promotional ventures. Voluntary cooperatives have been successfully established for numerous agricultural products. Indeed, since the beef checkoff program is premised on the theory that such programs are in the overall best interest of producers and importers (albeit they do not always recognize their best interests), it stands to reason that increased encouragement of voluntary cooperatives would eventually succeed in increasing the number of such cooperatives.

In sum, the beef checkoff program is not narrowly tailored to achieve the Secretary's policy interests. Numerous alternatives to those programs would achieve the Secretary's policy interests while infringing far less on First Amendment rights.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment below.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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